APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1734

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Petitioner,

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

PETITION FOR CERTIORARI FILED MAY 20, 1974
CERTIORARI GRANTED NOVEMBER 18, 1974

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN PROCEEDINGS BELOW

January 18, 1971—Original bill of complaint for recovery of taxes, penalty and interest improperly and erroneously paid.

May 12, 1971—General demurrer filed by the defendant.

May 26, 1971—Motion for leave to file an amended complaint for recovery of taxes, penalty and interest improperly and erroneously paid.

May 26, 1971—Order granting leave to file an amended bill of complaint for recovery of taxes, penalty and interest improperly and erroneously paid.

May 26, 1971—Amended bill of complaint for recovery of taxes, penalty and interest improperly and erroneously paid.

August 5, 1971—General demurrer filed by the defendant.

September 28, 1971—Decree overruling general demurrer filed.

November 18, 1971—Answer and cross bill filed by the defendant and cross-complainant.

January 13, 1972—Answer to the cross bill filed by complainant and cross-defendant.

January 20, 1972—Stipulation filed.

January 21, 1972—Trial in the Chancery Court of the First Judicial District of Hinds County, Mississippi commenced.

July 14, 1972—Opinion of the Chancery Court filed.

July 28, 1972—Final decree and judgment of the Chancery Court filed.

August 1, 1972—Notice to court reporter to transcribe notes and appellant's designation of record filed.

October 20, 1972—Appeal bond filed.

December 19, 1972—Record forwarded to the Supreme Court of Mississippi.

December 29, 1972—Record and bond filed in the Supreme Court of Mississippi.

January 28, 1974—Opinion of the Supreme Court of Mississippi.

February 18, 1974—Petition for rehearing denied by the Supreme Court of Mississippi.

April 25, 1974—Mandate issued by the Supreme Court of Mississippi.

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 81,953

W. M. GURLEY, d/b/a GURLEY OIL COMPANY
Complainant

v.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF
STATE TAX COMMISSION FOR THE STATE
OF MISSISSIPPI
Defendant

ORIGINAL BILL OF COMPLAINT FOR RECOVERY OF TAXES, PENALTY AND INTEREST IMPROPERLY AND ERRONEOUSLY PAID

(Filed January 18, 1971)

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI:

Complainant, W. M. Gurley, d/b/a Gurley Oil Company, respectfully states unto the Court that:

I.

Complainant is a sole proprietorship, with its office and principal place of business located in West Memphis, Arkansas, and it is authorized to do business in the State of Mississippi.

II.

That Defendant above named has been duly appointed to, and now holds and enjoys, the office of Chairman of the State Tax Commission for the State of Mississippi, with office and principal place of business in Jackson, Mississippi.

III.

This suit is brought pursuant to, and jurisdiction of this Court is conferred by, Section 10121, *Mississippi Code Annotated*, 1942.

IV.

Sections 10013-01, *et seq.*, *Mississippi Code Annotated*, 1942 (effective September 1, 1966, until January 1, 1970), imposed on excise tax on persons engaged in the business of selling gasoline. In particular, Section 10013-06, *Mississippi Code Annotated*, 1942, provided:

> "Any person engaged in business *as a distributor*, or *who acts as a distributor*, as defined in this act, *shall pay for the privilege of engaging in such business*, or acting as such distributor, *an excise tax* equal to and computed as follows:
>
> "(A) Seven cents (7¢) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose.
>
> "(B) Ten cents (10¢) per gallon on all diesel fuel and kerosene stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose. * * *
>
> "(C) One-half cent (1/2¢) per gallon on all oils, as defined in this act, stored, sold, or distributed or received in this state for sale, storage, distribution, or use * * * provided, that if any distributor or other person shall sell any oil knowing or having good reason to

know that the same is to be used or compounded, mixed, or blended for motor vehicle purposes, or for use in propelling motor vehicles, machines, or machinery of any type on the highways, as defined in this act, said distributor or other person selling same shall be liable for eight cents (8¢) per gallon tax on said oil. * * *

"* * * The *tax herein imposed and assessed shall be collected and paid to the State of Mississippi* but once in respect to any gasoline, diesel fuel, kerosene, or oil, and the basis for determining the tax liability shall be the correct invoiced gallons, adjusted to 60° F., at the refinery or point of origin of shipment when such shipment is made by tank car or by motor carrier."

This Section concluded with the following language:

"Provided that *the tax levied by this section may be passed on to the ultimate consumer* and such consumer in ascertaining his net income for the income tax purposes may deduct any such taxes he has actually paid, upon proof satisfactory to the Income Tax Commissioner, during the year from his gross income, provided the total deduction shall not exceed in any one (1) year ten per cent (10%) of the person's net income, and such tax shall be collected in the same manner as heretofore."

Section 10013-02, *Mississippi Code Annotated*, 1942, defined the term "distributor" for purposes herein as follows:

"(g) The term 'distributor' as used in this act shall include (1) every person who shall sell or distribute gasoline, diesel fuel, kerosene, or oil for resale, and (2) every person importing, receiving, purchasing, acquiring, using, storing, or selling any gasoline, diesel

fuel, kerosene or oil in this State on which the fuel excise tax hereinafter imposed by this act has not been paid, or the payment of which is not covered by the bond of a qualified Mississippi distributor; provided that no person may qualify as a distributor for the purpose of using oil, as defined in this act, as a fuel to propel a vehicle or vehicles owned by him on the highways of this State.

"The term 'distributor' as used in this act shall also include every person who distributes motor fuel other than gasoline, diesel fuel or kerosene through a regular pump, and such person shall be required to apply for a permit before distributing same, and no distributor of gasoline, diesel fuel, kerosene, or oil shall deliver any motor fuel other than gasoline, diesel fuel or kerosene into a regular retail service station tank to which a service pump is connected unless and until said permit has been issued."

V.

Section 10015-01, *et seq., Mississippi Code Annotated*, 1942 (effective September 1, 1966, until January 1, 1970) provided for the taxation of the sales of lubricating oil within the State of Mississippi. In particular, Section 10015-05, *Mississippi Code Annotated*, 1942, provided:

"Any person engaged in the business *as a distributor*, or *who acts as a distributor* as defined in this act, *shall pay for the privilege of engaging in such business* or acting as such distributor, an *excise tax* equal to and computed as follows:

"Two cents (2¢) per quart, (8¢ per gallon) on all lubricating oil stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, storage, distribution

or for use in the crank case of any internal combustion engine.

"Provided that *the tax herein imposed and assessed shall be collected and paid to the State of Mississippi* but once in respect to any lubricating oil, and the basis of determining the tax liability shall be the correct invoiced gallons at the refinery or the point of origin of shipment when such shipment is made by tank car or motor carrier."

For purposes of this article, Section 10015-02, *Mississippi Code Annotated,* 1942, defined the term "distributor" as follows:

"The term 'distributor' as used in this act shall include (1) Every person who shall sell or distribute lubricating oil for resale, (2) Every person importing, receiving, purchasing, acquiring, using, storing or selling any lubricating oil in this state on which the privilege excise tax hereinafter imposed by this act has not been paid, or the payment of which is not covered by the bond of a qualified Mississippi distributor."

VI.

Section 4081 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. §4081) provides:

"(a) There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ per gallon."

Section 4091 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. §4091) provides:

"There is hereby imposed on lubricating oil (other than cutting oils) which is sold in the United States by the manufacturer or producer a tax of 6 cents a gallon, to be paid by the manufacturer or producer."

VII.

Section 10104 *et seq.*, *Mississippi Code Annotated*, 1942, provides generally for the taxation on the sale at retail or resale of tangible personal property in the State of Mississippi computed on the basis of gross proceeds of retail sales. In particular, Section 10108, *Mississippi Code Annotated*, 1942, provides that:

> "Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed, and shall be collected a tax equal to five per cent (5%) of the gross proceeds of the retail sales of the business, except as otherwise provided herein."

> "* * * Wholesale sales, as defined in §10104-01, *Mississippi Code Annotated*, 1942, Recompiled, as Amended, shall be taxed at a rate of one eighth of one per cent (1/8 of 1%) of the gross proceeds of sales, except as otherwise provided." "* * * Wholesale sales of beer, motor fuel, soft drinks, and syrup shall be taxed at the rate of five per cent (5%) in lieu of the one eighth of one per cent (1/8 of 1%) wholesale tax, and the retailers shall file a return and compute the retail tax on retail sales, but may take credit for the amount of the tax paid to the wholesaler on said return covering the subsequent sales of same property, provided adequate invoices and records are maintained to substantiate the credit."

Section 10104, *Mississippi Code Annotated*, 1942, defines the phrase "gross proceeds of sales", as used in this act, as follows:

> "(7) 'Gross proceeds of sales' means the value proceeding or accruing from the full *sale price* of tangible personal property, including installation charges, carry-

ing charges, or any other addition to the selling price on account of deferred payments by the purchaser, without any deduction for freight, cost of property sold, or other expenses or losses, or taxes of any kind except those expressly exempt by §10116, Mississippi Code of 1942, Recompiled, as Amended."

VIII.

During the period September 1, 1965, through January 21, 1969, Complainant sold gasoline and lubricating oil within the State of Mississippi on which he collected and disbursed both Federal and State excise taxes as required by law.

Subsequent to audit, Complainant was assessed for this period an additional sales tax in the amount of $18,556.41. This additional sales tax liability was based upon Defendant's determination that both the Federal and State excise taxes constitute a valid part of "gross proceeds of sale". Complainant charges and complains that the Defendant's inclusion of the Federal and State excise taxes in his gross proceeds of sale was improper, erroneous and contrary to law, and neither of these taxes constitute a valid part of "gross proceeds of sale".

X.

Complainant has heretofore made full payment of the additional sales tax assessment. Complainant alleges that he alone bore the burden of the taxes herein sued for and did not directly or indirectly collect the taxes from his customers. Complainant alleges further that he has applied to the State Tax Commission by Petition in writing for hearing and correction of the amount of tax assessed upon him by Commissioner, which Petition was denied by Commission.

XI.

That Defendant has refused and continues to refuse to pay over to Complainant said amount of additional sales tax assessment, to-wit, $18,556.41, or to allow Complainant credit therefor.

XII.

Defendant's refusal to pay over to Complainant said amount or to allow credit therefor is arbitrary, capricious, and contrary to the statutes above cited.

WHEREFORE, Complainant prays that:

1. Process issue and be served on Defendant requiring him to answer this Bill of Complaint in full but oath to his answer is hereby waived.

2. Defendant pay over to Complainant the sum of $18,556.41, together with interest thereon at the highest legal rates from the date of payment or such other sum to which Complainant may be entitled or to allow Complainant credit therefor together with attorney's fees in an amount set by this Court.

3. Complainant have such other and further relief, both general and special, to which this Court may find Complainant entitled.

/s/ W. M. Gurley
Complainant

(Verification Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY,
MISSISSIPPI

(Title Omitted in Printing)

GENERAL DEMURRER

(Filed May 12, 1971)

Comes now Arny Rhoden, Chairman of the State Tax Commission of Mississippi, ddfendant by his attorneys, and demurs generally to the bill of complaint filed against him in this cause upon the following grounds, to-wit:

(1) There is no equity upon the face of said bill of complaint.

(2) For such other reasons as will be shown upon the hearing hereof.

Arny Rhoden, Chairman, State Tax Commission of Mississippi, Defendant

By: /s/ Taylor Carlisle
P. O. Box 960, Jackson, MS.

/s/ Wm. G. Burgin, Jr.
P. O. Box 32,
Columbus, MS.
His Attorneys

(Certificate Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

MOTION FOR LEAVE TO FILE AMENDED BILL OF COMPLAINT FOR RECOVERY OF TAXES, PENALTY AND INTEREST IMPROPERLY AND ERRONEOUSLY PAID

(Filed May 26, 1971)

Comes now the Complainant, W. M. Gurley, d/b/a Gurley Oil Company, and moves this Court for leave to file an Amended Bill of Complaint for Recovery of Taxes, Penalty and Interest Improperly and Erroneously Paid and as grounds for the granting of said Motion would show unto the Court the following:

1. That the Complainant was assessed additional sales taxes for a period subsequent to the period covered in the original Bill of Complaint filed in this cause and that such taxes were erroneously, improperly and unlawfully collected from Complainant for the same reasons as set forth in the original Bill of Complaint for the period covered thereby.

2. That during the same period covered by the additional assessments Complainant was improperly charged with sales taxes which were erroneous and contrary to law and which were improperly collected by Defendant on account of the erroneous determination of the sales price of the said gasoline and lubricating oil sold by Complainant during this period which taxes were paid by Complainant under protest by remittances filed with his regular returns.

3. That Complainant should be allowed to file its Amended Bill of Complaint in order for Complainant to ob-

tain full relief to which he is entitled and in order that all issues may be fully litigated in this action.

4. That Complainant should be allowed to file his Amended Bill of Complaint in order to more properly and fairly bring the issues of this cause to trial.

5. That the Amended Bill of Complaint is not filed for the purpose of delay and that the filing of same will not in any manner prejudice the Defendant.

Respectfully submitted,

W. M. Gurley, d/b/a Gurley Oil Company

By: /s/ Charles R. Davis
One of the Attorneys for Complainant

Thomas, Price, Alston, Jones & Davis
50 First National Bank Buolding
Post Office Drawer 1532
Jackson, Mississippi 39205

Armstrong Allen Braden Goodman
McBride & Prewitt
15th Floor Commerce Title Building
Memphis, Tennessee 38103
Of Counsel

Filed
May 26 1971
Tom Virden
Chancery Clerk
By /s/ Ruth May D. C.

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

ORDER GRANTING LEAVE TO FILE AMENDED BILL OF COMPLAINT FOR RECOVERY OF TAXES, PENALTY AND INTEREST IMPROPERLY AND ERROENOUSLY PAID

(Filed May 26, 1971)

This cause came on to be heard on Complainant's Motion for Leave to File Amended Bill of Complaint for Recovery of Taxes, Penalty and Interest Improperly and Erroneously Paid, and it appearing that justice requires such leave to be given, and the Court being fully advised, it is

ORDERED, ADJUDGED AND DECREED, that the Complainant, W. M. Gurley, d/b/a Gurley Oil Company, be, and he is hereby, allowed and permitted to file his Amended Bill of Complaint for Recovery of Taxes, Penalty and Interest Improperly and Erroneously Paid.

ORDERED, ADJUDGED AND DECREED, this the 26th day of May, 1971.

/s/ J. C. Stennett
Chancellor

Filed
May 26 1971
Tom Virden
Chancery Clerk
By /s/ Ruth May D. C.

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

AMENDED BILL OF COMPLAINT FOR RECOVERY OF TAXES, PENALTY AND INTEREST IMPROPERLY AND ERRONEOUSLY PAID

(Filed May 26, 1971)

TO THE HONORABLE CHANCELLORS OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI:

Complainant W. M. Gurley, d/b/a Gurley Oil Company, respectfully states unto the Court that:

I.

Complainant is a sole proprietorship, with its office and principal place of business located in West Memphis, Arkansas, and it is authorized to do business in the State of Mississippi.

II.

That Defendant above named has been duly appointed to, and now holds and enjoys, the office of Chairman of the State Tax Commission for the State of Mississippi, with office and principal place of business in Jackson, Missisippi.

III.

This suit is brought pursuant to, and jurisdiction of this Court is conferred by Section 10121, *Mississippi Code Annotated*, 1942.

IV.

Sections 10013-01, *et seq., Mississippi Code Annotated*, 1942 (effective September 1, 1966, until January 1, 1970),

imposed an excise tax on persons engaged in the business of selling gasoline. In particular, Section 10013-06, *Mississippi Code Annotated,* 1942, provided:

> "Any person engaged in business *as a distributor,* or *who acts as a distributor,* as defined by this act, *shall pay for the privilege of engaging in such business,* or acting as such distributor, *an excise tax* equal to and computed as follows:
>
> "(A) Seven cents (7¢) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose.
>
> "(B) Ten cents (10¢) per gallon on all diesel fuel and kerosene stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or recevied in this state for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose. * * *
>
> "(C) One-half cent (1/2¢) per gallon on all oils, as defined in this act, stored, sold or distributed or received in this state for sale, storage, distribution, or use * * * provided, that if any distributor or other person shall sell any oil knowing or having good reason to know that the same is to be used or compounded, mixed, or blended for motor vehicle purposes, or for use in propelling motor vehicles, machines, or machinery of any type on the highways, as defined in this act, said distributor or other person selling same shall be liable for eight cents (8¢) per gallon tax on said oil. * * *
>
> "* * * The *tax herein imposed and assessed shall be collected and paid to the State of Mississippi* but once

in respect to any gasoline, diesel fuel, kerosene, or oil, and the basis for determining the tax liability shall be the correct invoiced gallons, adjusted to 60° F., at the refinery or point of origin of shipment when such shipment is made by tank car or by motor carrier."

This section concluded with the following language:

> "Provided that *the tax levied by this section may be passed on to the ultimate consumer* and such consumer in ascertaining his net income for the income tax purpose may deduct any such taxes he has actually paid, upon proof satisfactory to the Income Tax Commissioner, during the year, from his gross income provided the total deduction shall not exceed in any one (1) year ten per cent (10%) of the person's net income, and such tax shall be collected in the same manner as heretofore."

Section 10076-01, *et seq., Mississipi Code Annotated*, 1942 (effective January 1, 1970) imposes an excise tax on persons engaged in the business of selling gasoline. In particular, Section 10076-05, *Mississippi Code Annotated*, 1942, provides:

> "Any person in business *as a distributor of* gasoline, or who acts as a distributor of gasoline, as defined in this act, *shall pay for the privilege of engaging in such business* or acting as such distributor *an excise tax* equal to Eight Cents (8¢) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose. . . .
>
> "Provided that *the tax herein imposed and assessed shall be collected and paid to the State of Mississippi*

but once in respect to any gasoline, and the basis for determining the tax liability shall be the correct invoiced gallons, adjusted to 60 degrees F., at the refinery or point of origin of shipment when such shipment is made by tank car or by motor carrier."

Section 10013-02, *Mississippi Code Annotated*, 1942, defined the term "distributor" for purposes herein as follows:

"(g) The term 'distributor' as used in this act shall include (1) every person who shall sell or distribute gasoline, diesel fuel, kerosene, or oil for resale, and (2) every person importing, receiving, purchasing, acquiring, using, storing, or selling any gasoline, diesel fuel, kerosene or oil in this State on which the fuel excise tax hereinafter imposed by this act has not been paid, or the payment of which is not covered by the bond of a qualified Mississippi distributor; provided that no person may qualify as a distributor for the purpose of using oil, as defined in this act, as a fuel to propel a vehicle or vehicles owned by him on the highways of this State.

"The term 'distributor' as used in this act shall also include every person who distributes motor fuel other than gasoline, diesel fuel or kerosene through a regular pump, and such person shall be required to apply for a permit before distributing same, and no distributor of gasoline, diesel fuel, kerosene, or oil shall deliver any motor fuel other than gasoline, diesel fuel or kerosene into a regular retail service station tank to which a service pump is connected unless and until said permit has been issued."

Section 10076-02, *Mississippi Code Annotated*, 1942, defines the term "distributor" for purposes herein as follows:

"(c) 'Distributor of gasoline' shall mean: (1) any person who shall sell or distribute gasoline for resale or use, or (2) any person importing, receiving, purchasing, acquiring, using, storing, or selling any gasoline in this State on which the gasoline excise tax hereinafter imposed by this act has not been paid or the payment of which is not covered by the bond of a qualified Mississippi distributor of gasoline. All refiners, processors, marine terminal operators, or pipeline terminal operators shall qualify as distributors of gasoline as provided in this act.

V.

Section 10015-01, *et seq., Mississippi Code Annotated,* 1942 (effective September 1, 1966, until January 1, 1970) imposed an excise tax on persons engaged in business as a distributor of lubricating oil within the State of Mississippi. In particular, Section 10015-05, *Mississippi Code Annotated,* 1942, provided:

"Any person engaged in the business *as a distributor,* or *who acts as a distributor* as defined in this act, *shall pay for the privilege of engaging in such business* or acting as such distributor, an *excise tax* equal to and computed as follows:

"Two cents (2¢) per quart, (8¢ per gallon) on all lubricating oil stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state or received in this state for sale, storage, distribution or for use in the crank case of any internal combustion engine.

"Provided that the tax herein imposed and assessed shall be collected and paid to the State of Mississippi but once in respect to any lubricating oil, and the basis of determining the tax liability shall be the cor-

rect invoiced gallons at the refinery or the point of origin of shipment when such shipment is made by tank car or motor carrier."

Section 10078-01, *et seq.*, *Mississippi Code Annotated*, 1942, (effective January 1, 1970) imposes an excise tax on persons engaged in business as a distributor of lubricating oil within the State of Mississippi. In particular, Section 10078-05, *Mississippi Code Annotated*, 1942, provides:

"Any person engaged in business *as a distributor* or *who acts as a distributor* as defined in this act, *shall pay for the privilege of engaging in such business* or acting as such distributor, an *excise tax* of Two Cents (2¢) per quart upon the sale or use in this State of lubricating oil by the distributor thereof. Provided that *the tax herein imposed and assessed shall be collected and paid to the State of Mississippi but once* in respect to any lubricating oil."

For purposes of this article, Section 10015-02, *Mississippi Code Annotated*, 1942, defined the term "distributor" as follows:

"The term 'distributor' as used in this act shall include (1) Every person who shall sell or distribute lubricating oil for resale, (2) Every person importing, receiving, purchasing, acquiring, using, storing or selling any lubricating oil in this state on which the privilege excise tax hereinafter imposed by this act has not been paid, or the payment of which is not covered by the bond of a qualified Mississippi distributor."

For purposes of this article, Section 10078-02, *Mississippi Code Annotated*, 1942, defines the term "distributor" as follows:

"(c) 'Distributor' means (1) Any person who shall sell or distribute lubricating oil for resale; (2) any person who shall sell or deliver lubricating oil (upon which the tax has not been paid) directly to a consumer; (3) any person who imports, produces, compounds, blends, purchases, or otherwise acquires lubricating oil upon which the tax has not been paid or the payment of which is not covered by the bond of a qualified distributor, and uses, or offers for sale and sells such lubricating oil as defined herein, shall be considered the distributor of such lubricating oil; and the term 'distributor' shall also mean 'refiner' or 'processor' as herein defined, except where the context clearly indicates otherwise."

VI.

Section 4081 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. §4081) provides:

"(a) There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ per gallon."

Section 4091 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. §4091) provides:

"There is hereby imposed on lubricating oil (other than cutting oils) which is sold in the United States by the manufacturer or producer a tax of 6 cents a gallon, to be paid by the manufacturer or producer."

VII.

Section 10104, *et seq., Mississippi Code Annotated*, 1942, provides generally for the taxation on the sale at retail or resale of tangible personal property in the State of Mississippi computed on the basis of gross proceeds of retail

sales. In particular, Section 10108, *Mississippi Code Annotated*, 1942, provides that:

> "Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed, and shall be collected a tax equal to five per cent (5%) of the gross proceeds of the reail sales of the business, except as otherwise provided herein."
>
> "* * * Wholesale sales, as defined in §10104-01, *Mississippi Code Annotated*, 1942, Recompiled, as Amended, shall be taxed at a rate of one-eighth of one per cent (1/8 of 1%) of the gross proceeds of sales, except as otherwise provided.
>
> "* * * Wholesale sales of beer, motor fuel, soft drinks, and syrup shall be taxed at the rate of five per cent (5%) in lieu of the one-eighth of one per cent (1/8 of 1%) wholesale tax, and the retailers shall file a return and compute the retail tax on retail sales but may take credit for the amount of the tax paid to the wholesaler on said return covering the subsequent sales of same property, provided adequate invoices and records are maintained to substantiate the credit."

Section 10104, *Mississippi Code Annotated*, 1942, defines the phrase "gross proceeds of sales", as used in this act, as follows:

> "(7) 'Gross proceeds of sales' means the value proceeding or accruing from the full sale price of tangible personal property, including installation charges, carrying charges, or any other addition to the selling price on account of deferred payments by the purchaser, without any deduction for freight, cost of property sold, or other expenses or losses, or taxes of any kind except those expressly exempt by §10116, Mississippi Code of 1942, Recompiled, as Amended."

VIII.

During the period September 1, 1965 through August 31, 1970, Complainant sold gasoline and lubricating oil within the State of Mississippi on which he collected and disbursed both Federal and State excise taxes as required by law.

IX.

During this period Complainant was improperly charged with sales taxes in the amount of $21,160.81 which were erroneous and contrary to law and which were improperly collected by the Defendant on account of the erroneous determination of the sales price of the said gasoline and lubricating oil sold by Complainant during this period. These taxes were paid under protest by Complainant to Defendant by remittances filed with his regular returns. Subsequent to audits, Complainant was assessed for this period additional sales taxes in the amount of $45,947.35. This sales tax liability was based upon Defendant's determination that both the Federal and State excise taxes constitute a valid part of "gross proceeds of sale". Complainant charges and complains that the Defendant's inclusion of the Federal and State excise taxes in his gross proceeds of sale was improper, erroneous and contrary to law, and neither of these taxes constitute a valid part of "gross proceeds of sale."

X.

Complainant has heretofore made full payment of the additional sales tax assessment. Complainant alleges that he alone bore the burden of the taxes herein sued for and did not directly or indirectly collect the taxes from his customers. Complainant further alleges that he has applied to the State Tax Commission by Petitions in writing for hearing and correction of the amount of tax additionally assessed upon him by Commissioner, which Petitioners were denied by Commission.

XI.

That Defendant has refused and continues to refuse to pay over to Complainant the amount of sales taxes erroneously, improperly and unlawfully collected from Complainant to-wit, $67,108.16, or to allow Complainant credit therefor.

XII.

Defendant's refusal to pay over to Complainant said amount or to allow credit therefor is arbitrary, capricious, and contrary to the statutes above cited.

WHEREFORE, Complainant prays that:

1. Process issue and be served on Defendant requiring him to answer this Amended Bill of Complaint in full but oath to his answer is hereby waived.

2. Defendant pay over to Complainant the sum of $67,108.16, together with interest thereon at the highest legal rates from the date of payment or such other sum to which Complainant may be entitled or to allow Complainant credit therefor together with attorney's fees in an amount set by this Court.

3. Complainant have such other and further relief, both general and special, to which this Court may find Complainant entitled.

/s/ W. M. Gurley
Complainant

Thomas, Price, Alston, Jones & Davis
Jackson, Mississippi

Armstrong Allen Braden Goodman
McBride & Prewitt
Memphis, Tennessee
Of Counsel

(Verification Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

GENERAL DEMURRER

(Filed August 5, 1971)

Comes now Arny Rhoden, Chairman and Commissioner of the State Tax Commission of Mississippi, defendant, by his attorneys and demurs generally to the amended bill of complaint filed herein against him on May 26, 1971, in this cause upon the following grounds, to-wit:

(1) There is no equity upon the face of said bill of complaint.

(2) For such other reasons as will be shown upon the hearing hereof.

Arny Rhoden, Chairman, State Tax
Commission of Mississippi,
Defendant

By: /s/ Taylor Carlisle
Post Office Box 960
Jackson, Mississippi 39205

/s/ Wm. G. Burgin, Jr.
Post Office Box 32
Columbus, Mississippi 39701
His Attorneys

(Certificate Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

DECREE OVERRULING GENERAL DEMURRER

(Filed September 28, 1971)

This cause coming on to be heard on the Amended Bill of Complaint for recovery of taxes, penalty and interest improperly and erroneously paid and General Demurrer thereto; and the Court having heard and considered the same together with the arguments of counsel for the Complainant and counsel for the Defendant, and being of the opinion that the said General Demurrer is not well taken and should be overruled:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the General Demurrer in the above entitled and numbered cause be, and the same is hereby overruled, and the Defendant having thereupon applied for leave to file an Answer, and having shown good cause, it is ordered that said Defendant have leave to file an Answer within fifteen (15) days from the date of completion by the Defendant of the inspection of those certain books, papers, documents and things which this Court has ordered the Complainant to make available to the Defendant.

ORDERED, ADJUDGED AND DECREED this the 28th day of September, 1971.

/s/ J. C. Stennett
Chancellor

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

ANSWER AND CROSS BILL

(Filed November 18, 1971)

Comes now Arny Rhoden, Chairman of the State Tax Commission of the State of Mississippi, defendant in the above styled and numbered cause, and for answer to the Amended Bill of Complaint exhibited against him in said cause, answering says:

I.

Defendant admits the allegations of Paragraphs I, II and III of the amended bill of complaint herein.

II.

Defendant admits the allegations of Paragraphs IV, V, VI and VII of said amended bill.

III.

Defendant admits that during the period from September 1, 1965 through August 31, 1970 complainant sold gasoline and lubricating oil within the State of Mississippi, but defendant denies that the defendant "collected and disbursed" federal and state excise taxes thereon, and states the facts to be that this defendant is advised and believes that said complainant during said period was a distributor of motor fuel within the definition of the motor fuel excise tax statutes of the State of Mississippi and a producer, importer or manufacturer of gasoline and lubricating oils within the meaning of the Federal Motor Vehicle Tax laws, and that by virtue of such fact said

complainant became liable for and apparently paid the Federal and State excise taxes levied against him.

IV.

Defendant denies that during the period from September 1, 1965 through August 31, 1970 that complainant was improperly charged with sales tax by the State of Mississippi in the amount of $21,160.81, or any other amount or amounts; denies that said named amount or any other amount was erroneously or improperly collected by the Tax Commission or collected contrary to law, and denies that any error was made against the complainant in the determination of the sales price of gasoline and lubricating oil sold by said complainant during said period, and denies payment of any such taxes by complainant under protest. Defendant admits that during the period from September 1, 1965 through August 31, 1970 complainant was assessed for additional sales tax liability, but defendant denies that such additional assessments were made subsequent to audits and denies that such additional assessments amounted to the sum of $45,947.35. Defendant admits that complainant's sales tax liability is to be determined by inclusion of both federal and state excise taxes as a valid part of gross proceeds of sale subject to sales tax under applicable Mississippi statutes, and denies that the inclusion of such taxes in complainant's gross proceeds of sale was improper, erroneous or contrary to law, and denies that such taxes do not constitute a valid part of gross proceeds of sale under Mississippi Sales Tax law.

And further answering, defendant would show that it has endeavored through audit of a portion of complainant's books and from an examination of the sales tax returns filed with defendant by such complainant to ascertain the basis of the $21,160.81 figure and the $45,947.35 figure alleged by complainant in Paragraph IX of the amended

bill of complaint, and defendant has been unable to establish any rational, reasonable or other basis therefor. Defendant therefore demands strict proof of such figures upon the trial of this cause, with specific reference to dates and amounts of each such alleged payment purporting to aggregate said amounts. Defendant would show that as shown by Exhibit "A" hereto attached, by order of the State Tax Commission dated March 25, 1969, complainant was assessed with additional sales tax and damages in the amount of $14,729.29 for the period from September 1, 1965 through January 31, 1969, and that such assessment has been paid by complainant.

And further answering, defendant states the facts to be that subsequently, on October 7, 1970, an additional assessment was made against complainant for additional sales tax, penalties and interest for the period from February 1, 1969 to August 31, 1970 in the amount of $27,390.91, and said assessment remaining unpaid, warrants were issued for collection of the same on October 27, 1970, and such assessment was paid by complainant on November 9, 1970. Complainant filed no petition for a hearing or correction of amount of additional sales tax assessed with defendant, in the manner provided and required by Section 10121 of the Mississippi Code, Recompiled.

V.

Defendant admits payment of additional sales taxes assessed against defendant, but denies such payments aggregated the amounts alleged in said original bill, and states the facts to be that the additional sales taxes assessed against and paid by said complainant for the period from September 1, 1965 through August 31, 1970 was the sum of $42,120.20. Defendant denies that complainant alone bore the burden of the taxes sought to be recovered by him in said amended bill, and denies that such taxes were not directly or indirectly collected by complainant

from his customers. Defendant further denies that complainant has made any application for a hearing and correction of the additional tax assessment made against him for the period from February 1, 1969 through August 31, 1970, but admits that he applied for and was afforded a hearing, and correction and refund of the tax assessed against him for the period from September 1, 1965 through January 31, 1969 was denied by the State Tax Commission.

VI.

Defendant admits that it has refused and continues to refuse to make any refund of sales taxes paid by complainant; but denies that any sales taxes so assessed, collected or paid by complainant were erroneously, improperly or unlawfully collected from him, and denies complainant is entitled to any such refund or credit therefor, in the amount alleged in Paragraph XI, or any other amount or amounts.

VII.

Defendant denies the allegations of Paragraph XII of said Amended Bill.

And now having fully answered the amended bill of complaint exhibited against him, defendant, for and on behalf of the State Tax Commission of the State of Mississippi, of which he is Chairman, and on behalf of the State of Mississippi, makes this his answer a Cross Bill against complainant W. M. Gurley, doing business as Gurley Oil Company, and would respectfully show unto the Court the following facts, to-wit:

I.

That the defendant and cross-complainant is Chairman of the Mississippi State Tax Commission and is charged by law with collection of all sales taxes levied un-

der the statutes of the State of Mississippi; and that the complainant and cross-defendant, W. M. Gurley, doing business as Gurley Oil Company, is authorized to do business in and is and has been engaged in business within the State of Mississippi; and that by virtue of such business operations has become and is liable for payment of sales taxes to the State of Mississippi as will be more particularly alleged herein.

II.

Cross-complainant would further show that under the terms and provisions of the Mississippi Sales Tax law, being Sections 10103 through 10139 of the Mississippi Code, Recompiles, and specifically under Section 10108 of the Mississippi Code, Recompiled, there is levied

> "Upon every person engaging or continuing within this State in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed and shall be collected a tax equal to five per cent (5%) of the gross proceeds of the retail sales of the business, except as otherwise provided herein."

> "- - - Wholesale sales as defined in Section 10104-01, Mississippi Code of 1942, Recompiled, as amended, shall be taxed at the rate of one-eighth of one per cent (1/8 of 1%) of the gross proceeds of sales, except as otherwise provided."

> "- - - Wholesale sales of beer, motor fuel, soft drinks and syrup shall be taxed at the rate of five per cent (5%) in lieu of the one-eighth of one per cent (1/8 of 1%) wholesale tax and the retailer shall file a return and compute the retail tax on retail sales, but may take credit for the amount of the tax paid to the wholesaler on said return covering the subsequent sales of same property, provided adequate invoices and records are maintained to substantiate the credit."

Cross-complainant would further show that cross-defendant is engaged in the wholesale and retail sale of motor fuel and other tangible personal property within the State of Mississippi, and has been so engaged for the period from September 1, 1965 through and including the 31st day of August, 1971, and that by virtue of the aforesaid statute said cross-defendant became liable for payment of sales taxes to the State of Mississippi. Cross-complainant would further show that for the period from February 1, 1969 through August 31, 1970 said cross-defendant had gross sales within the State of Mississippi subject to sales tax in the amount of $400,715.18, and that by virtue of such sales there accrued a sales tax liability to the State of Mississippi in the amount of $2,299.86 more than the amount of such sales taxes paid by said cross-defendant to the State of Mississippi for said period, as shown by auditor's work papers attached to this Cross Bill as Exhibit "B". Cross-complainant would further show that in accordance with the provisions of the Sales Tax law said cross-defendant is likewise indebted for a penalty in the amount of twenty-five per cent of said past due tax amounting to $574.97, together with interest thereon at the rate of one per cent (1%) per month of $305.92, and that the total amount due and owing to cross-complainant by said cross-defendant for said period is the sum of $3,-180.75.

III.

Cross-complainant would further show that for the period from September 1, 1970 to August 31, 1971 the cross-defendant has understated and underpaid his sales tax liability in the amount of $22,241.41, and that he is indebted to cross-complainant in said amount, plus penalties accruing thereon in the amount of twenty-five per cent (25%) of $5,560.20, plus interest at the rate of one per cent (1%) per month of $1,986.67, making a total ad-

ditional sales tax liability due by said cross-defendant for such period of $29,788.28. Cross-complainant attached hereto as Exhibit "C" work papers of audit of cross-defendant's records for said period showing the manner in which such additional tax liability was computed.

IV.

Cross-complainant would further show that it is entitled to judgment against said cross-defendant in the amount of $32,969.03 for such additional sales taxes due, together with interest at the rate of one per cent (1%) per month thereon from November 1, 1971 until paid.

WHEREFORE, PREMISES CONSIDERED, defendant and cross-complainant prays that this its Answer and Cross Bill may be received and filed; and that upon the final hearing hereof the Amended Bill of Complaint exhibited against him may be dismissed; and that cross-complainant may have and recover of and from said cross-defendant W. M. Gurley, doing business as Gurley Oil Company, the sum of $32,969.03 together with statutory interest at the rate of one per cent (1%) per month thereon from November 1, 1971 until paid, and together with all court costs accruing in this cause.

And cross-complainant prays for such other, further and general relief as may be mete and proper in the premises, as in duty bound he will ever pray.

Mississippi State Tax Commission
By /s/ Arny Rhoden
Chairman

William G. Burgin, Jr.
Taylor Carlisle
Post Office Box 960
Jackson, Mississippi
Attorneys for Defendant and
Cross-Complainant

(Verification and Certificate Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

ANSWER TO CROSS-BILL

(Filed January 13, 1972)

Now comes the Complainant and Cross-Defendant, W. M. Gurley, d/b/a Gurley Oil Company, and for answer to the Cross-Bill of Defendant and Cross-Complainant, Arny Rhoden, Commissioner, Chairman of State Tax Commission for the State of Mississippi, he denies all of the affirmative allegations contained in the Answer of the Defendant and Cross-Complainant and hereby incorporates and reiterates all of the allegations of his Amended Bill of Complaint in response to said Answer, and further answering paragraph by paragraph, the averments of the Cross-Bill, answers and says:

I.

Cross-Defendant admits the allegations of Paragraph I of the Cross-Bill, except Cross-Defendant denies that he is liable for payment of sales taxes to the State of Mississippi for the period from September 1, 1965 through and including the 31st day of August, 1971, in addition to the sales taxes which have been paid by the Cross-Defendant for this said period.

II.

Cross-Defendant denies each and every allegation of Paragraph II of the Cross-Bill except Cross-Defendant admits the terms and provisions of the Mississippi Sales Tax Law and Cross-Defendant admits that he is engaged in the wholesale and retail sale of motor fuel and other tangi-

ble personal property within the State of Mississippi and has been so engaged for the period from September 1, 1965 through and including the 31st day of August, 1971, and the said Cross-Defendant became liable by virtue of said statutes for the payment of a certain amount of sales taxes to the State of Mississippi.

III.

Cross-Defendant denies the allegations of Paragraph III of the Cross-Bill.

IV.

Cross-Defendant denies the allegations of Paragraph IV of the Cross-Bill.

And now having fully answered, Cross-Defendant prays to be dismissed with his costs.

/s/ W. M. Gurley
Complainant and Cross-Defendant

Thomas, Price, Alston, Jones & Davis
507 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205

Armstrong, Allen, Braden, Goodman,
McBride & Prewitt
Fifteenth Floor
Commerce Title Building
Memphis, Tennessee 38103
Of Counsel

(Verification Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

STIPULATION

(Filed January 20, 1972)

It is stipulated and agreed by and between counsel for the Complainant and Cross-Defendant, W. M. Gurley, and the Defendant and Cross-Complainant, Arny Rhoden, as follows, to-wit:

1. That during the period from September 1, 1965, through August 31, 1971, Complainant and Cross-Defendant sold gasoline within the State of Mississippi, which sales of motor fuel were subject to Mississippi state sales tax in accordance with the provisions of Section 10104, et seq. of the *Mississippi Code of 1942*, Recompiled.

2. That the primary issue in controversy between the parties herein is whether, under the provisions of the Mississippi Sales Tax Law referred to above, the taxes levied by the United States under the provisions of Section 4081 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. § 4081), and the taxes levied under the provisions of Section 10013-01, et seq. of the *Mississippi Code*, Recompiled (for the period ending January 1, 1970), and by Section 10076-01, et seq. of said Code (for the period from January 1, 1970, through August 31, 1971), on the gasoline sold by Complainant and Cross-Defendant, are properly includable within gross proceeds of sales for the purpose of computing the sales tax liability of Complainant and Cross-Defendant for the periods involved.

3. That if the Federal excise tax on gasoline and the Mississippi state excise tax thereon are not legally includable in gross proceeds of sales subject to the sales tax, then, subject to the reservations hereinafter set forth, the

Complainant would be entitled to recover from the Defendant the following amounts heretofore paid by said Complainant for the respective periods indicated.

a. The sum of $14,981.23 paid on April 14, 1969, by said Complainant as the result of an additional sales tax assessment (which includes penalties and interest thereon) made by Defendant against him for the period beginning September 1, 1965, through January 31, 1969.

b. The additional sum of $27,390.91 paid by Complainant to Defendant as the result of an additional assessment of sales taxes (which includes penalties and interest accruing thereon) under a jeopardy warrant for the period from February 1, 1969, through August 31, 1970, such payment having been made by Complainant on November 10, 1970.

c. The additional sum of $19,542.67, being that portion of sales tax payments made by Complainant to Defendant for the period from September 1, 1965, through August 31, 1971, under protest, which would not have been due or payable had the Federal and State excise taxes on gasoline been excluded from gross proceeds of the sales of such products by Complainant in computing his sales tex liability for said period, the computation of which amount is more particularly itemized and shown by Exhibit "A" hereto attached consisting of fourteen (14) pages which cover the entire period of time shown above.

d. The additional sum of $867.76, being costs of collection of the jeopardy warrant referred to in subparagraph 3b above.

4. That payment of the amount specified and set forth in paragraph 3c above (if the Court should determine that such State and Federal excise taxes are not legally includable in gross sales) shall be subject to the Court's decision of the question of whether all or any portion of the amount therein mentioned is barred under the

provisions of Section 10121.2 of the *Mississippi Code,* Recompiled, which provides a three-year statute of limitations on suits to recover sales taxes.

5. That if the Court should decide the primary issue in favor of the Complainant herein, said Complainant would be entitled to interest on the amount of his recovery at the legal rate from the dates of payment.

6. That if the Court should determine the primary issue involved herein of whether the Federal and State excise taxes on gasoline referred to above are legally subject to be included in gross proceeds of sale for the purpose of computing the Complainant's sales tax liability in favor of the inclusion of such taxes, then, in that event, the Defendant and Cross-Complainant shall thereupon be entitled (subject to the reservations hereinafter set forth) to recover from the Complainant and Cross-Defendant the following sums for the respective periods indicated:

a. Additional sales taxes in the amount of $2,299.86, plus such penalties and interest thereon as are provided by law, for the period from February 1, 1969, through August 31, 1970, said additional tax liability being as computed and shown on the Supplemental Additional Sales and Use Tax Return with supporting documents attached hereto as Exhibit "B", consisting of two (2) pages.

b. Additional sales taxes in the amount of $22,241.41, plus such penalties and interest thereon as are provided by law, for the period from September 1, 1970, through August 31, 1971, said additional tax liability being as computed and shown on the Supplemental Additional Sales and Use Tax Return with supporting documents attached hereto as Exhibit "C", consisting of two (2) pages.

7. That the provisions of Paragraph 6 above are expressly subject to the following which constitutes a question which is not stipulated or agreed upon but is left open for decision by the Court under proof and the applicable law:

Whether Complainant's method of selling gasoline at certain locations, being the Bolden Grocery, Broadway Grocery, Thompson Grocery and Riley Grocery, and any other stations similarly operated during the period from September 1, 1965, through August 31, 1971, constituted retail sales of such products by Complainant taxable for sales tax purposes to him, insofar as amounts paid from gross sales by Complainant to the store owners is concerned.

8. That the parties hereto have made no stipulation or agreement, in any event, that the Complainant and Cross-Defendant alone bore the burden of the taxes sought to be recovered by him in this proceeding, which question shall be determined by the Court on proof.

9. That the Federal excise tax on diesel fuel is levied and imposed on the retail sale of such diesel fuel, and such taxes have, therefore, been excluded by both parties in computing the respective amounts alleged by each of them to be due.

APPROVED AND AGREED TO on this the 20th day of January, 1972.

W. M. Gurley, d/b/a Gurley Oil Company, Complainant and Cross-Defendant

By /s/ Charles R. Davis

/s/ Hubert A. McBride

/s/ David H. Nutt

Arny Rhoden, Commissioner and Chairman of the State Tax Commission of the State of Mississippi

By /s/ Taylor Carlisle

/s/ James E. Williams

/s/ Wm. G. Burgin, Jr.

(Exhibits omitted in printing)

[119] IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

NOS. 81,953 and 82,374

(Title of Consolidated Cases Omitted in Printing)

TRANSCRIPT OF TRIAL IN THE CHANCERY COURT

APPEARANCES:

Mr. Charles Ray Davis, of Thomas, Price, Alston, Jones & Davis, First National Bank Building, 507 First National Bank Building, Post Office Drawer 1532, Jackson, Mississippi 39205, and

Mr. Hubert A. McBride, of Armstrong, Allen, Braden, Goodman, McBride & Prewitt, Fifteenth Floor, Commerce Title Building, Memphis, Tennessee 38103

PRESENT AND REPRESENTING THE COMPLAINANT —W. M. Gurley, d/b/a Gurley Oil Company.

[120] *Mr. William G. Burgin, Jr.*, P. O. Box 32, Columbus, Mississippi 39701, and

Mr. Taylor Carlisle, P. O. Box 960, Jackson, Mississippi 39205, and

Mr. James E. Williams, P. O. Box 960, Jackson, Mississippi 39205,

PRESENT AND REPRESENTING THE DEFENDANT— Arny Rhoden, Commissioner, Chairman of State Tax Commission for the State of Mississippi.

BE IT REMEMBERED, that on, to-wit, the 21st day of January, 1972, one of the days of the regular January, 1972 Term of the Chancery Court aforesaid, the above en-

titled matter came on for hearing in the Hinds County Chancery Courtroom No. 3, in the Chancery Court Building at Jackson, Mississippi, before the Honorable J. C. Stennett, Chancellor of the Fifth Chancery Court District of the State of Mississippi, sole presiding, when and where the following proceedings were had and entered of record, to-wit:

W. M. GURLEY

having been first duly sworn, was called as a witness on behalf of the Complainant, and testified as follows:

Direct Examination

By Mr. Davis:

Q. Mr. Gurley, state your name, please, sir. [121] A. W. M. Gurley.

Q. Where do you reside, Mr. Gurley? A. Memphis, Tennessee.

Q. Have you always resided in Memphis, Tennessee? A. No, sir.

Q. Where are you from originally? A. I was born and raised near Potts Camp, Mississippi, Marshall County.

Q. How long did you reside there in Marshall County? A. In excess of 18 years.

Q. Now what is your occupation, Mr. Gurley? A. I'm in the oil business, in the gasoline and lubricating oil business.

Q. What has been your experience in the gasoline and lubricating oil business? A. Well, I first started in the—dealing with lube oils back in 1947. I started in the gasoline business, or got into that phase of it in 1953, building my first station at Olive Branch, Mississippi.

Q. All right. Now since 1953 what has been the development of your business operation in the State of Mississippi? A. Well, I have several additional locations

within the State of Mississippi as well as stations in Tennessee and Arkansas.

Q. All right, sir. Describe to the Court, Mr. Gurley, the type of operation that you have in the State of Mississippi. [122] A. Well, of course, I have a retail operation in the State of Mississippi, which the majority of my business is retail, that I control and operate with salaried employees. I do have a few locations, grocery stores that we do supply some products to, that this is done on a basis that I do not control the employees within these particular locations.

Q. So is it your testimony that you have a certain number of retail gasoline stations in the State of Mississippi? A. Yes, sir.

Q. Approximately how many do you have? A. Well, I control and operate with salaried employees five locations in North Mississippi.

Q. Tell us generally where these stations are located, if you will. A. I have one at Nesbitt, one at Olive Branch, one at Byhalia, one at Potts Camp, and one at Walnut, Mississippi.

The little grocery store operations are at Lewisburg, Victoria and north of Holly Springs. We only have three of those type operations at the present time.

Q. State whether or not the grocery store operation that you do not control, state what percentage of your total business approximately is done through those outlets. A. Oh, probably ten or twelve percent of our business would be done in these particular outlets.

Q. So you are testifying that essentially you have a retail operation in the State of Mississippi? A. Yes, sir.

[123] Q. Now, Mr. Gurley, I will ask you to describe to the Court the nature of your business operation in Mississippi. Tell us how it works. A. Well, of course, the product that we sell within the State of Mississippi is

either pulled from Tennessee or from Arkansas. This is number one, as to where we get our gasoline and diesel fuels from, it comes from those two particular outlets, and, of course, we buy on the market wherever we can buy a product at the most economical price, again getting quality product.

Q. Excuse me, Mr. Gurley, if I may interrupt you: You are testifying about the purchase of your product.

Your Honor, we have an exhibit which has been prepared here, and I would like for Mr. Gurley to refer to it in connection with his testimony if we may put that up at this point.

By the Court:

All right, you may.

(Exhibit displayed in front of the witness and the court).

By Mr. Davis (Continuing):

Q. All right, sir. A. This gasoline is purchased, as you can see, at approximate price, since we are including regular and premium, at an approximate price of 14¢ per gallon and, of course, this is picked up within our own trucks, [124] transported into the State of Mississippi, and we in turn then are putting it on the market for sale in the categories and brackets of approximately—this figure does fluctuate; because of the retail price of gasoline, it would fluctuate this—at a price of approximately 20¢ per gallon. We then do charge or collect from the people, built into our pump price, a cent a gallon, a 5% rate on evaluation of 20¢ which would be a cent a gallon, which would give us a total price of 21¢ per gallon. Then over and above that we collect federal tax in the amount of 4¢ per gallon, and then we collect state tax, up to 1970 in the amount of 7¢; from 1970 on we have been collecting 8¢ per gallon.

Q. What type of tax is this that you collect? A. Well, this is—The first one is the federal excise tax, and the Mississippi state is a gasoline tax.

Q. These two taxes are excise taxes on the sale of gasoline, . . . A. Yes, sir.

Q. . . . is that correct? A. Yes, sir.

By Mr. Burgin:

We object to that and move that it be stricken on the ground that it is a conclusion of the witness. The statute speaks for itself.

By the Court:

Well, the Court would think so. Let's move along.

[125] By Mr. Davis (Continuing):

Q. Now, Mr. Gurley, describe to the Court, if you will, who bears the burden of the 1¢ sales tax that's shown on the exhibit there. A. In our pump prices, and in our computation of this, this 1¢ is borne by the person that is paying for the product; in other words, that is included and we classify that as a part of the sale price. In other words, the customer bears that 1¢.

Q. All right, sir. State whether or not you have passed on to the ultimate consumer any amount of tax which you seek to recover in this action. A. No, sir, we have not. This portion and sales tax part of it, these taxes, has been borne completely by me.

Q. Describe to the Court in a little more detail what you're referring to now. A. Well, what I'm saying is that in computing this, we classify that this is a sale at the ending point of product cost, plus our markup, plus a sales tax on that. That is where we consummate as far as sale is concerned. The other is a collection and not a sale. Therefore, we are unable to pass along to the customer a sales tax in excess of 5% over and above a sale, and that's what we classify as a sale.

Q. State whether or not you have collected from the ultimate consumer or customer of yours any amount of sales tax on the federal and state gasoline tax. A. In our retail outlets we have not collected [126] anything in these particular categories.

Q. Now do I understand that you're testifying, then, that you have borne the burden of the tax that you seek to recover in this action? A. Yes, sir.

Q. You have not passed this on to the ultimate consumer? A. No, sir.

Q. Now, Mr. Gurley, is that true in all instances? A. We have made some wholesale sales, and this constitutes maybe a matter of maybe $10,000 total within this whole realm of time that we have made sales to customers outside of our own stations. In other words, we would classify them as wholesale sales, and in those sales out there, of course, it would be a different story. In two instances we charged the full amount of 5% on the total amount of the invoice, and this would constitute—I say two, really it's one customer—this will constitute probably two, maybe a couple of thousand dollars worth of sales.

Q. How does that compare with the total amount of sales we're talking about in this lawsuit? A. We're talking about in this total lawsuit of some four and a half million dollars worth of total sales, compared to maybe $2,000 or $2,500 in this particular category here.

Q. Approximately what percent of the total amount involved here would that be? [127] A. Well, it would be less than 1/10 of 1%.

Q. All right, sir. A. I might say in other instances, though, where we have sold some gasoline on a wholesale basis where we felt that all we would have to pay would be the 1/8 of 1% wholesale tax, this constituted about $6,000 worth of sales. The state has contended that we

owe 5% and have charged us back, and we have had to bear, or in the bill it is bearing a 5% tax against this where we collected nothing.

Q. All right, sir. Mr. Gurley, I will ask you now to describe to the Court and tell the Court what preparations you make before bringing a product into the State of Mississippi. A. We have to give the State of Mississippi an import notice. This is notification that we are bringing products into the State of Mississippi. This has to be postmarked prior to the product coming into the State of Mississippi. This notice is mailed, and it is a triplicate notice. The one notice goes on to the State of Mississippi and we retain two copies, then at the time of preparing our tax report, which has to be filed by the 20th of the following month, one copy of this is affixed to our report and is forwarded to the State of Mississippi in order for them to reconcile the import notice that was mailed to them. On that report we list the import notice, the company from whom it was purchased, and the product, whether it is diesel or gasoline or whatever it might be that we're bringing into the State of Mississippi.

[128] Q. All right, sir. Now I'll ask you, Mr. Gurley, to describe to the Court generally what procedure you follow in handling the federal excise tax on the sale of gasoline which is shown on your exhibit here, poster, as being 4¢ per gallon. A. The 4¢ a gallon federal tax on gasoline and diesel fuel is reported on a federal form that—by making a request that we want to pay our taxes on an individual basis or by— In other words, we file the report. They will issue us and put us in the mail this particular form which is a quarterly report. Now we have to make federal depositories on this product three working days after the first, and three working days after the fifteenth of each month. Then at the end of a quarter, we have a full month to reconcile any deficiencies or over-

payments that we might have asked for. It is deficiency: we do not ever overpay. In this area, to reconcile this quarterly report, at the end— In other words, we have 30 days after a quarter ends in order to compute this and forward this in to the I.R.S.

Q. All right, sir. Now you referred to the fact that you actually transmit funds to a federal depository three working days after the first and three working days after the fifteenth of each month. Now state to the Court what relationship the time of filing those depositories has to the actual sale of the gasoline. A. This is computed on the actual product that has moved to the consumer. This is the way that we compute [129] this. In other words, this is computed against a beginning inventory, receipts, less a closing inventory, and then we pay against the actual gallons that has been sold by the consumer in both of these categories.

Q. So you pay— Are you testifying, then, that you pay the federal excise tax on the basis of actual gallons sold to a consumer? A. That is correct.

Q. Mr. Gurley, I'll ask you what do you have to do in order to meet federal requirements in order to pay the federal excise tax on the basis which you have described. A. There is no bond or any prerequisite that we have to set up in order to get this. You merely give the Internal Revenue Service notice that you want to pay this tax, and they will give you the number, which, incidentally, is the same number as your Social Security withholding tax number. These two numbers are one and the same, but they are reported on different forms.

Q. State whether or not you actually pay in the same deposit and on the same number the Social Security and withholding tax that is collected for the government which relates to your employees. A. I'm not— Restate that question, would you, please?

Q. State whether or not, Mr. Gurley, you pay Social Security and withholding taxes to the federal government on your employees . . .

[130] By Mr. Burgin:

We object to this. It's immaterial to the lawsuit, the issues involved.

By The Court:

Up until this point, the Court feels—
Let him finish the question.
Have you finished your question?

By Mr. Davis:

I'll withdraw the question. I think he has already answered it.

By The Court:

All right. The objection will be sustained.

By Mr. Davis (Continuing):

Q. Mr. Gurley, state whether or not you have to be a manufacturer in order to get this number from the Internal Revenue Service. A. I am not a manufacturer of gasoline, and there is no—there was no problem whatsoever for me to obtain this permission.

Q. You're not a manufacturer; what category do you fall in? A. Well, I'm a retailer of gasoline and diesel fuel.

Q. All right, sir. Mr. Gurley, state whether or not there is any distinction between your method of handling the federal excise tax on the sale of gasoline and that on the sale of diesel. A. There is no differential whatsoever. It is made and reported on the same form, the federal depositories [131] are made one and the same, there is not a separation between the federal depository between gasoline and diesel fuel. There is a separate depository between gasoline, diesel fuel, and Social Security and with-

holding, there are two separate depositories on that, but there is no separation between gasoline and diesel fuel.

Q. State whether or not, Mr. Gurley, it is permissible for the retailer to pay the federal gasoline tax or not. A. Well, I'm a retailer and I'm able to pay this, consequently a retailer can pay the federal excise tax.

Q. Are you testifying, then, that it's not necessary for you to be a manufacturer to pay this tax? A. No, sir, it is not necessary.

Q. When I say "pay the tax", or when you say "pay the tax", what are you referring to there? A. I'm referring to collecting it from the customer, retaining this until the prescribed time to make payment to the federal government. In other words, it is first collected before it is paid; it is not paid before the collection is made.

Q. All right, sir. Mr. Gurley, I'll ask you to describe to the Court, please, sir, your method of handling the state excise tax on the sale of gasoline and diesel fuel which is referred to on your exhibit as being 7¢ per gallon and which you testified to earlier as since January 1, 1970, being 8¢ per gallon. A. Well, of course, anything that is brought into the state within a calendar month, for computing purposes [132] is subject to taxation or to payment of tax by the 20th of the following month, and of course as I have already described, the method of forms that we use in order to comply with the state requirement and that the payment would be required to be made by the 20th of the following month.

Q. All right, sir. State whether or not, Mr. Gurley, the state excise tax on the sale of gasoline is actually collected by you from the consumer prior to the time that you transmit it on to the State of Mississippi. A. Yes, sir, it is collected by me prior to me passing it on. The reason that all of this is collected is the fact that there is never more than a seven-day supply of product on hand at any

time. Consequently, by the 7th of the following month all sales have been made, which is some 13 days prior to me paying the tax on this product.

Q. All right, sir. Now, Mr. Gurley, I'll ask you whether or not you are required by the State of Mississippi to put up a bond in connection with the state excise tax on gasoline. A. Yes, sir. It is a requirement made to put up bond with the State of Mississippi.

Q. And what's the purpose of this bond? A. The purpose of this bond is to assure the state that I will perform and pay the tax as prescribed within their law.

[133] Q. Mr. Gurley, what happens in the event of fire or spillage of gasoline after you have purchased it and brought it into the State of Mississippi prior to the time of actual sale by you? A. If there is any excessive loss such as a fire or a vehicle being turned over, fire or spillage, then there is a form that we fill out and certify to that this product was lost and credit can be taken against the payment of our tax.

Q. At what point is this credit taken? A. Well, actually it is taken at the time that the accident really happens; in other words, the time that the spillage or that the fire would occur.

Q. All right, sir. State whether or not you ever actually transmit any tax to the State of Mississippi on such gasoline. A. No. There would be no reason for this, in the fact that it would be permissible to take credit on this.

Q. So are you testifying that by the time you actually file your return, that you've been able to effectuate this credit? A. Yes. sir.

Q. Now describe to the Court, Mr. Gurley, what happens in the event that you bring gasoline into the State of Mississippi and then take it back out of the State of Mississippi prior to the time of a retail sale. A. There's

also a form there that the State of Mississippi has for a claim against product that is [134] brought into the state and you take it, remove it back out of the state to where you can also receive credit against this product that was taken out of the state.

Now this has to be correlated with a substantiating report that this product went somewhere else into another state, and corroborating information has to be supplied to them from the other state where the product went into.

Q. Is it your testimony, then, that you never actually pay any tax or transmit any tax on to the State of Mississippi on such gasoline that is brought in and taken back out? A. There would be no need for that, and by expediting your paper work you would be able to do this.

Q. All right, sir. State whether or not, Mr. Gurley, you are allowed as a retailer—

State whether or not you are allowed as a retailer of gasoline to take an evaporation allowance on your sales of gasoline. A. Yes, sir. There is a 2% evaporation and spillage allowance in reporting your tax. This is deducted from the net gallons at the time of making the report.

Q. Now are you referring to the state excise tax on gasoline? A. Yes, sir.

Q. All right, sir. Is this also true in connection with the federal excise tax ? A. No, sir. The federal does not prescribe any evaporation losses. They work strictly from the amount of product that has actually been sold.

[135] Q. Mr. Gurley, is this evaporation allowance under the state excise gasoline tax procedures allowed on both diesel and gasoline? A. No, sir. It is only allowed on gasoline.

Q. Now explain that to the Court. A. Well, the purpose in this being that gasoline is a very volatile and very highly evaporative material; in other words, it will evaporate, and consequently the diesel fuel will not

evaporate, and the intent of this is that the net number of gallons that the customer receives, the evaporation would absorb this loss factor and that no tax would be collected against the customer over and above what actually had been sold. Actually it would be less than what had been sold, is really what it would amount to, by taking this 2% evaporation.

Q. State whether or not you're saying that the evaporation allowance is for the purpose of putting the tax on net gallons into the tank of the customer. A. That is the purpose of that, to make sure that there is that many gallons to be sold to the customer out there.

Q. State whether or not in a period from the time that you purchase the gasoline in Arkansas or Tennessee from a supplier or manufacturer, until the time that you through your pumps sell it to an ultimate consumer, there is an evaporation of gasoline in that period. A. That's correct.

[136] Q. Mr. Gurley, state to the Court, please, sir, when the state excise tax on gasoline is paid on gasoline which is brought into the State of Mississippi by a distributor and stored in this state. A. When a distributor brings the product in and stores it into a bulk storage operation, the tax on this product is payable after it is conveyed to an ultimate retail outlet or a consumer account.

Q. State whether or not the tax in this case is paid when the gasoline is brought into the State of Mississippi. A. No, sir, it is not computed on what is brought into the State of Mississippi.

Q. What is it computed on? A. It's computed— I say it's computed and paid after it is delivered to either a retail outlet or a consumer account. In that particular calendar month is when it's prescribed and paid for.

Q. I see. Mr. Gurley, I'll ask you, please, sir, to generally and briefly describe to the Court and compare for

the Court your operation with that of a major oil company's operation. A. Well, of course, there is a considerable amount of differentiation in this. For instance, in my case, there is no middleman or men between the manufacturer or supplier and the ultimate retailer. In other words, I am—take all those gaps in between there. For a major oil station, they might have two or three different methods of handling this, but one of the more common ones is what is called a [137] distributor. This distributor has the product in a bulk storage tank, and when he removes this product and carries it to the service station, puts it in his tanks, he renders to that man an invoice. On this invoice he lists the product, the number of gallons, the price per gallon, and extends this price on out. When he gets down to—When he finishes this, then he will apply the federal tax, the state tax, . . .

By Mr. Burgin:

I object to that, Your Honor, unless this man knows this of his own personal knowledge. Furthermore, the invoices would be the best evidence of it.

By the Court:

The Court would think so, but he can testify if he knows.

Let's go along.

A. He would list the federal tax, the state tax, gasoline tax, and any other state or county taxes that might be applicable in this particular case.

By Mr. Davis (Continuing):

Q. All right, sir. State whether or not, Mr. Gurley, in the usual major oil company operation you have the involvement of a sale by the manufacturer or major oil company to a distributor, a sale by that distributor to a retail operator, and a sale by that retail operator to the

ultimate consumer. A. Well, this is basically what happens. Now that distributor might be a consignee and he may report as a [138] basic employee of this manufacturer, but he could also be an independent operator. In other words, there are two categories here that they fall into, so he could be one of the two, and it could be an invoice from the major oil company to the distributor, then an invoice from the distributor to the retail station, and then the retail station making a sale to the ultimate consumer.

Q. Mr. Gurley, I'll ask you whether or not in your operation there is a sale from the manufacturer or supplier in Tennessee or in Arkansas to you, and then a sale by you to the ultimate consumer. A. There is a sale of the product to me, but the sale is made with no taxation included at all. This is just the bare product as we're listing here, and then all of the additional are collected from the consumer by myself.

Q. State whether or not there is any tax—by "any tax" I mean—Well, strike that.

State whether or not there is any federal or state excise tax charged to you by the supplier or manufacturer on that sale of the product of your supplier to yourself. A. No, there is not. There is no tax at all on it.

Q. Mr. Gurley, I'll ask you, sir, to state whether or not you were ever allowed by the State of Mississippi to exclude state and federal excise tax from gross proceeds of sale in your computation of sales tax to the State of Mississippi. A. They do permit the deduction of the 4¢ federal tax on diesel fuel only in arriving at the sales tax.

[139] Q. All right, sir. Now is that the situation at this time? A. That is the situation at this time.

Q. I'll ask you whether or not at any point in the past you have ever been allowed to deduct the federal and state excise tax on gasoline. A. Yes, sir. In the early years of operation, which was when I first started in 1953.

we were able to deduct the federal and state tax from the computation of sales tax.

Q. All right, sir. When did this stop, approximately? A. Oh, sometime in the fifties, in there, in the middle or late fifties.

Q. What happened at that time with regard to the procedure which you followed in reporting your sales tax to the State of Mississippi? A. Well, of course, this naturally created some controversy and some discussion, and one of my competitors, Mr. Langston, said that he was having a man to come up and discuss the sales tax . . .

By Mr. Burgin:

We object to that as being hearsay.

By Mr. Davis:

Your Honor, he's testifying to what he heard of his own personal knowledge.

By the Court:

Well, it wasn't in the presence of any of these defendants and cross-complainants, so the objection will [140] be sustained.

By Mr. Davis (Continuing):

Q. All right, Mr. Gurley. I'll ask you, sir, what occurred then after approximately 1960 when you were not allowed any longer to deduct federal and state excise tax. A. There was a meeting, I was present, Mr. Langston, and someone from the Mississippi Tax Department, Sales Tax Department, was at his place describing what could be done and the method of handling it.

By Mr. Burgin:

We object unless the witness identifies the person alleged to be from the Tax Commission, Your Honor.

By the Court:

If he knows he was from the Tax Commission, I don't think he would be required to know his name.

Q. Could you further identify the tax representative? A. Your Honor, I don't recall the name.

By the Court (Continuing):

All right. We'll let him testify if he knows that's where he was from.

By Mr. Davis (Continuing):

Q. Go ahead, Mr. Gurley. A. And at this time in the discussion, which was carried basically by Mr. Langston, that in order to arrive at something equitable out here as far as what he wanted to do, the method of paying taxes, and discussing with [141] the tax man, it was agreed at that point that a price of 23.5 per gallon would be acceptable to use this as a basis for computing the income, total income of sales from gasoline, and that sales tax would be computed on this basis.

Q. All right, sir. Now what was the situation with regard to diesel? A. Diesel fuel was set up on 21.5.

Q. Now, Mr. Gurley, did you follow this procedure in making your sales tax returns from that point forward? A. Yes, sir, we did.

Q. How long did you continue that procedure? A. We continued that procedure—The fact of the business, we continued to follow that procedure up until just a few months ago.

Q. All right, sir. Why did you change your procedure a few months ago? A. Well, of course, we are involved in the proceedings here today with the State of Mississippi.

Q. Now, Mr. Gurley, I'll ask you whether or not you paid your taxes during that period of time, from approxi-

mately 1960 down to a very short while ago, to the Sales Tax Commission of Mississippi under protest. A. Yes, sir. We paid these, and across the face of our tax reports just wrote "Paid under Protest"; even though I paid the 23.5, I did not agree with this, because this was also including part of the federal and state tax involved in this.

[142] Q. Mr. Gurley, I'll ask you now, sir, to describe to the Court your method of computing gross receipts for the purpose of complying with the Fair Labor Standards Act. A. Well, of course, in complying with this, any location that does in excess of $250,000 per location has to comply with the Fair Labor Standards, which is the minimum wage plus time and a half for any time over 40 hours per week. In this we are able to deduct any federal and state taxes in computing this gross dollar of $250,000; it can be deleted.

By Mr. Burgin:

We object, and move to strike that as immaterial, Your Honor, as to what's permitted in determining gross receipts under the Fair Labor Standards Act, as not being within the scope of the issues involved in this case.

By the Court:

It may not be, but the objection is overruled.

By Mr. Davis (Continuing):

Q. State whether or not the taxes you referred to, Mr. Gurley, are state and federal excise taxes on the sale of gasoline. A. That is what we are talking about.

Q. And it is your testimony, sir, that you are allowed to deduct these two taxes from the total gross receipts received by you in your operation which . . .

By Mr. Burgin:

We object for the additional reason as being repetitious.

[143] By the Court:

Let him answer it again. Objection overruled.

A. Yes, sir. This is the purpose of it.

By Mr. Davis (Continuing):

All right, sir.

* * *

[149] *Cross Examination*

* * *

By Mr. Burgin:

Q. Yes, sir. Now, Mr. Gurley, in your operation, as you indicated, you eliminate the wholesale distributor which exists in most gasoline operations, do you not, sir?

A. Yes, sir.

Q. You are both the wholesale distributor and the retailer in your instance? A. I am not a wholesaler; I am a retailer.

Q. You buy from the manufacturer and distribute to your individual retail locations, do you not, sir? A. No, sir.

Q. You do not? A. I put it into the retail location and sell it. There is no distribution between us.

Q. You don't distribute from where you purchase your source of supply? A. The same ownership at the source of supply is the same ownership at the retail outlet.

Q. I realize that, sir, but you do have to distribute it, do you not, sir? A. There is only a transportation; that is not [160] distribution.

Q. I see. All right, sir. Now you do have to post a bond as a wholesale distributor of gasoline with the Motor Vehicle Comptroller of the State of Mississippi, do you not? A. I post a bond in order to perform the requirements of paying the tax on the gasoline.

Q. Yes, sir, and if you did not post that bond, you would have to pay the state tax of 7¢ a gallon, the state privilege tax on wholesale distribution of gasoline, at the

time you imported that gasoline into the State of Mississippi, would you not, sir?

By Mr. Davis:

Your Honor, we object to the Senator's use of the word "privilege tax".

By the Court:

Well, describe what tax it actually is, Mr. Burgin. Rephrase the question.

By Mr. Davis:

The tax is described in the statute, as I understand it, Your Honor, as the Mississippi gasoline excise tax.

By Mr. Burgin:

Yes, sir, and it's also described in the statute as levied upon wholesale distributors for the privilege of doing business in the State of Mississippi, Your Honor.

By the Court:

But it's still an excise tax. Let's move along.

[161] By Mr. Burgin (Continuing):

Q. If you did not post that bond you would have to pay the tax on the gasoline as you brought it into the state, would you not, sir? A. I would have to pay it somewhere. Now whether it had to be before I brought it into the state would be something else. Probably not.

Q. As a matter of fact, the bond that you post with the Motor Vehicle Comptroller is conditioned upon your payment of the tax, of the excise tax levied, is it not, upon the wholesale distributor? A. It is a bond to assure the state that this tax will be subscribed and paid for.

Q. Yes, sir, and so far as payment of that tax is concerned, the State of Mississippi doesn't care whether you ever sell that gas to anybody else, do they sir; they expect their money on the 20th day of the following month, don't

they? A. I don't know that they expect it. It would be a little stupid of a person not to sell it and pay tax on something.

Q. I didn't ask you that, sir, but whether you sold the gas or not makes no difference to the state so far as your tax liability is concerned, does it, sir?

By Mr. Davis:

Your Honor, I object to that. Mr. Gurley has testified already that the state regulations allow him to take credit—If he does not sell gasoline, he does not [162] have to pay tax on that.

By Mr. Burgin:

I didn't understand his testimony that way, Your Honor.

By the Court:

Well, there could be an exception there. We will give Mr. Gurley a chance to explain it.

Do you have a copy of the bond, Senator Burgin?

By Mr. Burgin:

No, sir, but I can get one mighty quick.

By the Court:

Well, that's all right. Let's move along.

A. Would you restate your question?

By Mr. Burgin:

Would you read the question back, Mr. Reporter?

By the Reporter (Reading):

"Q. I didn't ask you that, sir, but whether you sold the gas or not makes no difference to the state so far as your tax liability is concerned, does it, sir?" A. Well, they are expecting to get their money.

By Mr. Burgin (Continuing):

Q. Yes, sir, whether you sold it to somebody to get the gas to an ultimate consumer or not, isn't that true, sir? A. Within the prescribed time, yes.

Q. Yes, sir. Now, Mr. Gurley, as I understood your testimony, you said that on the wholesale sales that you make, you bill the customer for 20¢ a gallon and then you [163] bill them for 4¢ federal tax and 7¢ state tax and 1¢ sales tax, is that correct? A. No, sir, I did not say that.

Q. You didn't say that? I misunderstood you, then. Would you tell us now how you do bill? A. The billing of product, which again we're talking about in a four and a half million dollar sale—you're talking about $10,000 worth of sales in this particular category, which is very, very small. This is an area that we're not even looking for business, we have done this as a courtesy to some people that have wanted some product, and when we bill this it is normally billed with everything included and just a total price is the total factor that we utilize as far as billing is concerned, and we're talking about transactions here within this whole scope of time of probably 15 to 18 transactions is all we're talking about, so this is not our normal business, this is not our normal procedure, and it's not something that we do with any kind of rapidity that we would really have a system of doing.

Q. All right, and I'll ask you, sir, is it not true that when you do make those wholesale sales, you add your 5% wholesale sales tax on the entire price, including the amount in the price for reimbursement of state and federal excise taxes? A. We have done this in, I believe, three occasions only, and that was right at the end, or at the beginning—at the end of '70 or the beginning of 1971—to one [164] account only . . .

Q. I see. A. . . . has this ever been done, and the total amount of tax involved in this would probably be

something—sales tax, I'm talking about—would probably be something over $100 is all we're talking about.

Q. All right, sir. I'll ask you, sir, if your normal invoices do not also say that the prices shown include state and federal taxes. A. Our normal invoices?

Q. Yes, sir. A. I'm going to be honest with you; I don't even recall whether that's on there or not. It may be.

Q. All right, sir. I hand you here a series of invoices to "Cummings Goco" and ask you to examine them. (Hands invoices to the witness). A. (Examining invoices). All right.

Q. Are those invoices in connection with the sale of your product? A. They are invoices pertaining to the wholesale product of lubricating oil.

Q. All right, sir, and . . .

By Mr. Davis:

Your Honor, we're going to object to any testimony as to these documents, since it has been stipulated that this suit does not deal with lubricating oil.

By the Court:

In what paragraph of your stipulation is that, [165] Mr. Davis?

By Mr. Davis:

I beg your pardon, Your Honor. The stipulation as such does not say that, but a reading of the stipulation will indicate that the total amount of taxes sought to be recovered here relates only to the federal and state excise tax on the sale of gasoline.

By the Court:

What paragraph is that in, Mr. Davis?

By Mr. Davis:

For example, in the first paragraph of the stipulation, the stipulation reads "That during the period from September 1, 1965, through August 31, 1971, Complainant and Cross-Defendant sold gasoline within the State of Mississippi . . ."

By the Court:

All right, sir. I see your paragraph. There's no point in your going on and reading it further.

By Mr. Davis:

There is no reference in here where we refer to the amount of money that we're seeking. It's pointed out therein that the tax we're talking about was upon the sale of gasoline.

By the Court:

Yes, sir. All right. The objection will be sustained.

[166] By Mr. Burgin (Continuing):

Q. Mr. Gurley, what is the retail price of your gasoline as shown on your pumps at your retail stations on regular? A. I couldn't tell you.

Q. Well, you know what it is approximately, don't you, sir? A. The price of gasoline changes. In all fairness—I mean, I'm not trying to evade your question, but I mean if I gave you an answer it could or could not be true. It might have been true yesterday but it may not be true this morning. Gasoline prices change tremendously.

Q. I realize that, sir, but is it not true that the pumps through which your gasoline is sold at retail show one gross purchase price per gallon? A. This is the only thing you have within your meter heads to set on there.

Q. Yes, sir. For instance, on regular the price would show perhaps 37.9¢, would it not? A. No, sir, we've never sold it that high.

Q. Well, 32.9¢? A. That is high, also; possibly 30.9. We might get that high.

Q. All right, and then your Ethyl would show one price again, would it not, say 32.9¢? A. Yes, sir.

Q. All right, sir, and the gross amount of your sale to any given customer would be that pump price times the [167] number of gallons that's pumped into his automobile, would it not? A. That would be the dollars and cents transaction.

Q. Yes, sir, and that is the gross proceeds of that sale to that customer, isn't it? A. That is the sale plus the tax plus the tax plus the tax, is the total.

Q. That's the way you interpret it, sir, . . . A. Yes.

Q. . . . but if I go up to your pumps today and I buy 10 gallons of Ethyl at 32.9¢, the purchase price as shown on that pump would be $3.29, would it not, and I would pay your operator $3.29, would I not, sir? A. You would pay that with—If you asked for an explanation, . . .

Q. I didn't—In other words, I'm buying gas, I'm not asking for an explanation. I want to run my car, . . . A. All right.

Q. . . . and your man—I'd say, "How much?" and your man would say "$3.29" and I'd pay him, and that would be it, wouldn't it? A. If that was what was showing on the pump, yes.

Q. Yes, sir, and that's the only price that's showing on any pumps, is the current price, the gross price at which you sell the product per gallon? A. No, sir, this is not the case.

Q. It's not? [168] A. No, sir. This is up in the meter head of the pump. That's all that you would ever see, but we do have decals, and have had them and a lot of times they will wear off before we replace them, but they also state as to the amount of federal and state tax that is involved in it.

Q. I see, but you don't put your price at 20¢ a gallon on the pump and then after the pump comes out add 4¢ federal tax and 7¢ state tax, do you? A. No, sir.

Q. Yes, sir. Now you said when you first started doing business back in '53 in Mississippi that you didn't include the state and federal excise tax in the computation of your sales tax. That was before the statute was amended to remove it from exemption from sales tax, wasn't it ? A. Well, I was able to exempt it at the time I started in business.

Q. Yes, sir, and then in 1956 the law was changed and you had to include it, or you were supposed to have? A. There was a change sometime in the fifties.

Q. Yes, sir.

(Whereupon a ten-minute recess was taken at this point).

By Mr. Burgin (Continuing):

Q. Mr. Gurley, you buy this gasoline from a source, we will say, in Arkansas? I believe that is where you said most of your product came from? [169] A. Arkansas and Tennessee.

Q. Yes, sir, and you have a permit, do you not, as a distributor issued by the Motor Vehicle Comptroller of the State of Mississippi? A. I don't know that it's called a permit. The compliance with the different phases or requirements of the law, to my knowledge, is the bond. Once subscribing to this, then this puts you into this category.

Q. You don't recall that simultaneously with posting the bond and its approval that you were issued a permit by the state? A. They may call it a permit and it may be a permit number, but I mean—and I'm just . . .

Q. You have to qualify with the Motor Vehicle Comptroller in order to bring this gas in and distribute it. don't you? A. Yes, sir.

Q. All right, sir, and that bond obligates you to pay the state tax on it, does it not, sir? A. Well, it obligates me to collect and to pass on to the state the tax.

Q. All right, sir. Now the state is looking to you and your bondsman for the payment of that tax, regardless, is it not, sir, on that gasoline? A. They are looking to me for the payment.

Q. Yes, sir. Now so far as the state is concerned, there is nothing in the world to keep you from paying 14¢ for the gas to your source, and paying the tax to the state, and selling it to your customers at 10¢ a gallon, is there? [170] A. No, sir, there's nothing in there to stop it.

Q. Nothing in the world to prevent you from doing that, is there? A. Not that I know of.

Q. All right, sir, and in effect what you do is pay the tax to the State of Mississippi as a gasoline distributor and then you pay that—you pass on as a matter of choice to your customers, the consumers, that cost which you have incurred, isn't it? A. If I sold it for 10¢ a gallon, I wouldn't be passing along that cost.

Q. No, sir, but when you sell regular for 30.9¢, for instance, you are passing on the tax that you had to pay on the gas to the ultimate consumer, are you not, sir? A. No, sir. I'm collecting the tax in order to pass the tax to the State of Mississippi.

Q. Oh, I see. All right, sir. By the same token, you pass on, at least indirectly, to your customers, do you not, sir, all the other costs that you incur in doing business? A. This is built in to your cost factor plus profit under normal conditions, yes.

Q. Yes sir. You pass on to the ultimate consumer the 14¢ a gallon, for instance, that is cost of the product, don't you? A. This is a part of the sale price, yes.

Q. Yes, sir, and you pass on to the ultimate consumer, your customer, your overhead, your cost of operat-

ing, of [171] transporting the gas to the point of retail distribution? That's built in to your total price, is it not, sir? A. That is in between the purchase price and the sale price.

Q. Yes, sir, and by the same token, the federal and state tax is also in between the purchase price and the sale price, is it not, sir? A. No, sir, not in my—That is a collection, and we are custodians for the federal and for the state for the tax.

Q. I see, but actually, sir, if the state is looking only to you for payment of the tax, what you do with the gasoline is immaterial, is it not? A. No, sir, I would not say that.

Q. I see. All of your costs of doing business in the normal situation, including your profit, goes to make up the 30.9¢, for example, don't they, sir?

By Mr. Davis:

Your Honor, he's asked him that question at least ten times, and I object to it as repetition.

By the Court:

It might be repetitous, Mr. Burgin.
Move along.

By Mr. Burgin (Continuing):

All right, sir. I have no further questions.

[172] *Redirect Examination*

By Mr. Davis:

Q. Mr. Gurley, you testified that you entered into agreements with the various grocery store operations, is that correct? A. Yes, sir.

Q. Now are these rural grocery store operations? A. Yes, sir. Primarily, yes, sir.

Q. I see. State whether or not, Mr. Gurley, the consignment agreement, which has been introduced as Exhibit D-1 to your testimony, contains a provision in paragraph IV that "Title to all products consigned and delivered to consignee hereunder shall at all times remain in consignor until they shall have been sold by consignee in accordance with the terms of this agreement." A. What was the question? I'm sorry.

Q. Is there such a provision in the contract which I have here, . . . A. Yes, sir.

Q. . . . which is Exhibit D-1 to your testimony? (Hands instrument to the witness).

A. (Examining instrument). Yes, sir.

Q. Is there such a provision in all of the contracts which you have with these various operators? A. Basically, yes.

Q. All right, sir. Now, Mr. Gurley, I'll ask you whether or not you actually pay 4¢ per gallon to these various operators? [173] A. There is no payment made. This is merely a bookkeeping procedure at the point, and it is deleted from the total price or the total amount of dollars and cents that was involved.

Q. So you don't treat this as a payment to an employee, do you? A. No, sir.

Q. Do you know whether or not these various operators actually receive in the end result 4¢ per gallon? A. No, sir.

By Mr. Davis (Continuing):

That's all, Your Honor.

By the Court:

Anything further, Mr. Burgin?

By Mr. Burgin:

Yes, sir. I have only one or two questions relative to that line of questioning.

By the Court:

All right.

Recross Examination

By Mr. Burgin:

Q. Mr. Gurley, is it not a fact that the commissions which you pay to your consignees appear on your books as an expense of sale and as a deduction from the gross sales price of gasoline made by those consignees? [174] A. In order to fulfill the bookkeeping of the gallons and the dollars and cents involved in this, they would have to use a computation from this.

Q. And your books, as a matter of fact, do show the gross sales price of the gasoline made by these consignees and show commissions as an expense of sale? A. We show that as a total in order to be able to keep books, is the purpose of that as far as the way it is shown.

By Mr. Burgin (Continuing):

That's all.

By the Court:

Q. Mr. Gurley, in reference to Bolden Grocery, Broadway Grocery, Thompson Grocery, and the Riley Grocery Store when it was in operation, did the gasoline pump at these grocery stores show principally the same figures for taxes, for price of gas, and so forth and so on, as the ones that you actually operated yourself as a retailer? A. As far as the total price is concerned, this price could have been different, and very probably was different.

Q. Who fixed that total price on the gasoline there? A. That was at our discretion, Your Honor.

Q. At your discretion? A. Yes, sir.

Q. In other words, you had the right to fix the price there just the same as you did on your pumps? A. Yes, sir.

[175] Q. And then the Boldens, the Broadways and the Thompsons had no right over the price of the gasoline at all, . . . A. No, sir, they did not.

Q. . . . as to what was shown on the pump? A. Yes, sir.

By the Court (Continuing):

All right, sir. You may be excused.

(Witness Excused).

By Mr. Davis:

That's all we have, Your Honor.
Complainant Rests.

[176] JOE SHARP

having been first duly sworn, was called as a witness on behalf of the Defendant, and testified as follows:

Direct Examination

By Mr. Burgin:

Q. Mr. Sharp, what official position, if any, do you hold with the State of Mississippi? A. I am the Motor Vehicle Comptroller for the State of Mississippi.

Q. In that capacity, what are your responsibilities with respect to the excise tax statutes on gasoline? A. I'm the administrator of those taxes.

Q. All right, sir. Mr. Sharp, I'll ask you what is required for a distributor or importer of gasoline, such as Mr. Gurley, to qualify with the state under the statutes? A. He must first apply for a permit from our Department to operate. He must also furnish a bond, ranging anywhere from $1,000 to $25,000.

Q. All right, sir. A. We will then issue the permit to him.

Q. Does that—What is the condition of that bond, sir? A. Conditioned upon the faithful payment to the State of Mississippi of the gasoline excise tax.

Q. All right, sir, and what is the permit issued, what does it authorize the man to do? A. It authorizes him to act as a distributor . . .

[177] By Mr. Davis:

Your Honor, we object. The permit will speak for itself. It would be the best evidence.

By the Court:

The objection will be sustained.

By Mr. Burgin (Continuing):

Q. All right, sir. Under the statute, can any person legally import gasoline into the State of Mississippi in absence of permit and bond? A. No, sir.

By Mr. Davis:

I object, Your Honor. This calls for a legal conclusion of the statutes.

By the Court:

Your objection will be sustained.

By Mr. Burgin:

Sir?

By the Court:

I sustained his objection, Senator Burgin. The statute would speak for itself.

By Mr. Burgin (Continuing):

Q. All right, sir. Mr. Sharp, to whom do you look for payment of the gasoline excise taxes? A. To the distributor.

Q. The distributor? A. Yes, sir.

Q. Does it make any difference, so far as the tax liability of the distributor whether—what the distributor [178] does with the gasoline that he imports into the State of Mississippi? A. Not so far as . . .

By Mr. Davis:

I object to that, Your Honor. That is a legal conclusion, as to what the tax liability of anybody would be.

By the Court:

I think you can rephrase that question, Mr. Burgin, and get it where it won't be objectionable.

By Mr. Burgin (Continuing):

All right, sir. I believe you testified, Mr. Sharp, that the state looks solely to the distributor for payment of the excise tax on gasoline? A. That's correct, sir.

Q. Does it make any difference, so far as the distributor's liability for payment of the tax, whether he has sold the gasoline or not? A. No, sir.

Q. Does it make any difference, so far as the distributor's tax liability is concerned, as to whether if he has sold the gasoline, he adds to his cost or purchase price the amount of the tax?

By Mr. Davis:

I object to the question, Your Honor, and I move to strike the answer to the previous question on the ground that again he is asking this witness to draw a legal conclusion here.

[179] By Mr. Burgin:

Your Honor, the complainant has sought to testify that he simply acts as a collecting agent from the ultimate consumer to the state.

By the Court:

I think Mr. Sharp can testify, Mr. Davis, as to the way his office is conducted and the provisions and the requirements.

Go ahead. Objection overruled.

By Mr. Burgin (Continuing):

Q. Would you like to have the question repeated? A. I would, yes, sir.

Q. Does it make any difference, so far as the distributor's liability to the state for payment of the excise tax on gasoline, whether the distributor has, in selling the gas, has passed the tax on to the ultimate consumer? A. No, sir.

Q. Can a person legally import gas into the State of Mississippi without obtaining a permit and posting the bond for payment of the tax? A. No, sir.

Q. In absence of a bond, Mr. Sharp, if I give your office notice that I intend to import a tankload of gasoline into the State of Mississippi, at what point would the excise tax become payable? A. At the moment you crossed the Mississippi state line.

[180] Q. And who would owe that tax at that time? A. The distributor.

Q. The distributor? A. Yes, sir.

Q. The man bringing it in? A. That's correct.

By Mr. Burgin (Continuing):

We have no further questions of this witness.

Cross Examination

By Mr. Davis:

Q. Mr. Sharp, you testified that you are charged with administering the excise tax on gasoline for the State of Mississippi, is that correct? A. Yes, sir.

Q. Now in such capacity, Mr. Sharp, isn't it true that you are concerned with receiving cash dollars into your office for the state; that's your major concern, isn't it? A. My major concern is collection of the gasoline excise taxes, yes.

Q. That's right. You only want to collect the tax; you don't care who the tax is imposed upon, do you? A. The tax is imposed upon the distributor and is so stated in the statute.

Q. That didn't answer my question. I didn't ask you that question. I asked you whether or not it was any concern of your office and your responsibility in [181] administering the Mississippi state gasoline excise tax as to who the tax is imposed upon. A. Very definitely. It is of concern to my Department.

Q. In what way is it a concern of your Department? A. Because of the statutes that we are required by law to administer. The statutes so state.

Q. The statute requires you to collect the tax, doesn't it? A. Yes, it does.

Q. It doesn't require you to determine who the tax is imposed upon, does it? A. It requires me to, shall we use the word "charge", an excise tax based upon a rate of gallons upon a distributor as a privilege for doing business.

Q. All right. It empowers you to charge a tax to the distributor, does it not, and collect it from him? A. That's correct.

Q. O.K. Now you testified, Mr. Sharp, that the tax is imposed at the moment that it crosses the state line? A. That's correct.

Q. Now that really isn't true, is it? A. Well, the statutes do provide that on the 20th of the month is the time for filing of the report, . . .

Q. All right. So . . . A. . . . provided a man has a permit.

Q. All right. So if Mr. Gurley has a permit, it is perfectly permissible for him to transmit that tax to you on the 20th day of the month following the month in which [182] the gallons came into the State of Mississippi? A. That's correct.

Q. All right. Mr. Sharp, does the statute which we refer to and which you administer contain refund provisions? A. It does.

Q. Describe to the Court briefly who those refunds are to and how they are made. A. Refunds are made—let's use 7¢ per gallon—refunds are made to users of gasoline at the rate of 6¢ per gallon for non-highway use.

Q. You say that the tax is refunded to the user? A. That's correct.

Q. How do you explain the fact, Mr. Sharp, that the tax is refunded to the user? Isn't that contradictory to your testimony that it is a tax on the distributor? A. I just do what the law says.

Q. All right. That's what I was trying to get you to say earlier.

By Mr. Carlisle:

We object to any comment.

By the Court:

The objection will be sustained.

By Mr. Davis (Continuing):

Q. Mr. Sharp, you don't actually know, do you, whether or not Mr. Gurley collects the tax from the ultimate consumer or not, do you? A. No, sir.

[183] Q. That's no concern of yours? A. That's correct.

Q. Your only concern is that you get the cash dollars into the state treasury, isn't that correct? A. That we get the dollars.

Q. That you get the dollars? A. Not necessarily cash.

Q. All right, sir. Now can a person be both a distributor and a retailer? A. In some cases.

Q. All right, sir, can a distributor, then, import gasoline into the State of Mississippi without giving notice to your office? A. He's not supposed to.

Q. All right, sir. You said that the same person could be both a distributor and a retailer. Can a person be a distributor and not be a retailer? A. Yes, sir.

Q. All right, sir. Mr. Sharp, state whether or not you, in administering your Act,—Strike that, Mr. Godwin. Describe to the Court what the requirements are with regard to gasoline that is stored within the State of Mississipi. A. The same requirement as in the case of anyone that imports; regardless of how it gets into the state, whether it's barge or pipeline or transport truck, the tax liability still attaches as it crosses the state line.

[184] Q. Are you testifying that the tax liability does not accrue at the time it's withdrawn from storage? A. No, sir. It does not on gasoline.

By Mr. Davis (Continuing):

All right, sir.
That's all we have.

Redirect Examination

By Mr. Burgin:

Q. Mr. Sharp, I hand you here a document and ask you if you can identify it. (Hands instrument to the witness). A. (Examining instrument). Yes, sir, I can.

Q. What is it, sir? A. It's Motor Vehicle Permit No. 447 for a distributor of gasoline, diesel fuel, kerosene or oil, to W. M. Gurley, doing business as GOCO, Gurley Oil Company.

Q. What is attached to that? A. Attached to it is an application to our Department for such a permit.

By Mr. Davis:

Your Honor, I'd like to have an opportunity to examine that.

By the Court:

All right. You will have that before he introduces it.

By Mr. Burgin:

I'll be glad to let him see it now, Your Honor. (Hands instrument to Mr. Davis, who examines it).

[185] By the Court:

All right, sir.

By Mr. Davis:

Your Honor, to expedite matters we are going to object to the introduction or any testimony with regard to these documents as not being proper rebuttal at this point. We did not go into any of these matters on cross examination.

By the Court:

Well, the objection will be overruled, Mr. Davis. This is not necessarily a rebuttal witness; it's further cross examination.

By Mr. Davis:

All right, sir.

Your Honor, we have some objections with regard to these documents. Evidently the Permit No. 447, Distributor of Gasoline, is not a complete copy of that document, it's not executed by anyone, and we would object on that ground, and we object to any testimony or introduction of this document here which is simply a form. It's not—It doesn't have anybody's name on it.

By Mr. Burgin:

Your Honor, I think we can connect that up. I was trying to save time.

By the Court:

All right. Let's see if you can connect it up, yes, sir.

[186] By Mr. Burgin (Continuing):

Q. Mr. Sharp, with reference to the instrument and application which you have identified, I'll ask you where the original of that permit is. A. It should be in Mr. Gurley's possession.

Q. Is this the file—a copy—a file copy maintained in the official records of your office? A. It is.

By Mr. Burgin (Continuing):

We offer the permit as a distributor of gasoline, diesel fuel, kerosene, oil, and the supporting application in evidence.

By Mr. Davis:

I object, Your Honor, on the grounds that the document is not, on its face, a true and correct copy of the permit.

By the Court:

Could I see it, please? (Examines instrument handed him by Counsel).

I think in order for your objection to be well taken you can be called upon to produce the original of this. The application is signed by "Mr. W. M. Gurley, Owner".

By Mr. Burgin:

Your Honor, at this point I move that the complainant and cross defendant be required to produce the original of the permit, in absence of which we be permitted to introduce the copy.

[187] By Mr. Davis:

Your Honor, we will make every effort to do that, if Mr. Gurley has it. I note that this document was dated in 1966.

By the Court:

Well now, Mr. Davis, to all intents and purposes Mr. Gurley is the only one that really needs to have a signed copy of that, isn't he, the permit signed by the Motor Vehicle Comptroller's office?

By Mr. Davis:

Yes, sir, I would think so.

By the Court:

Very well. Let it be admitted. The objection will be overruled.

(Whereupon Permit No. 447 was marked by the Reporter as EXHIBIT D-2 to the testimony of the witness Sharp, was received in evidence, and is attached hereto):

STATE OF MISSISSIPPI
MOTOR VEHICLE COMPTROLLER
JACKSON, MISSISSIPPI

PERMIT No. 447

DISTRIBUTOR OF GASOLINE, DIESEL FUEL,
KEROSENE OR OIL

KNOW ALL MEN BY THESE PRESENTS:

W. M. Gurley d/b/a GOCO (Gurley Oil Co.)
P. O. Box 2326
Memphis, Tennessee

has been granted the right to engage in the business of Distributor of Gasoline, Diesel Fuel, Kerosene or Oil within the State of Mississippi, subject to the terms and conditions of Chapter 264, Laws of 1946 as amended.

Given under my hand and seal of office this the 7 day of October, 1966.

....
Motor Vehicle Comptroller

[188] EXHIBIT D-2—Witness, Sharp

STATE OF MISSISSIPPI—MOTOR VEHICLE COMPTROLLER

APPLICATION FOR PERMIT AS DISTRIBUTOR OF GASOLINE, DIESEL FUEL, KEROSENE OR OIL

Record of Revocation

Permit No. ....
Type of Bond G & O
Bond Required $16,000.00

To the MOTOR VEHICLE COMPTROLLER
State of Mississippi
Jackson, Mississippi

Date August 29, 1966

Application for a permit is hereby made by the undersigned to engage in the business of Distributor of Gasoline, Diesel Fuel, Kerosene or Oil in the State of Mississippi:

NAME OF BUSINESS: W. M. Gurley d/b/a GOCO (Gurley Oil Company)

ADDRESS P. O. Box 2326, Memphis, Tennessee

Individual, Partnership or Corporation: Individual

Full name and address of owner if individual W. M. Gurley, P. O. Box 2326, Memphis, Tenn.

Names and addresses of partners, if partnership ....

....

Names and addresses of officers, if a corporation ....

....

Incorporated under Laws of State of ....

Capital Stock $..........................

Principal place of business in Mississippi Olive Branch, Mississippi

Other places of business in Mississippi ....

Nesbit
Potts Camp
Byhalia

Approximate gallonage of Gasoline, Diesel Fuel and Kerosene to be received or sold in the most active month of the year .... Approximate gallonage of oil (as defined in statute) to be received or sold in the most active month of the year ....

Total gallonage handled during preceding calendar year ....

Gasoline ....
Diesel Fuel ....
Kerosene ....
Oil ....

Have you heretofore given bond as a distributor in Mississippi? .... If so name of bonding company ....
Amount of Bond $16,000.00 Date ....

SIGNATURES OF PERSONS APPEARING IMMEDIATELY BELOW ARE HEREBY AUTHORIZED TO SIGN AS AGENTS:

....	....
(Actual Signature of Agent)	(Actual Signature of Agent)

....
(Actual Signature of Agent)

Name of Individual, Partnership or Corporation Gurley Oil Company

By /s/ W. M. Gurley (Title) Owner

[189] By Mr. Burgin (Continuing):

Q. Mr. Sharp, I hand you another document and ask you if you can tell me what that is, sir. (Hands instrument to the witness). A. (Examining instrument). It is a permit to operate as a distributor of crankcase lubricating oils.

Q. Is that a copy of an original that was issued by your office to Gurley Oil Company? A. It is.

Q. And what is the document attached to it? A. It is an application.

Q. By whom is it signed? A. "W. M. Gurley, Gurley Oil Company."

By Mr. Burgin (Continuing):

All right, sir.

We offer this permit in evidence as an exhibit to the testimony of Mr. Sharp.

By Mr. Davis:

I object, Your Honor. Lubricating oil is not involved.

By the Court:

It's not in issue, as the Court understands it, Mr. Burgin, so the objection will be sustained.

By Mr. Burgin (Continuing):

All right, sir. Good.

Q. In connection with the permit to act as a distributor of gasoline, diesel fuel, kerosene, which has been introduced, did Mr. Gurley post a bond? [190] A. He did, sir.

Q. Can you tell me the amount of that bond? A. $16,000.00.

Q. Mr. Sharp, does your office have a standard bond form which is executed in connection—before permits of this nature are issued? A. Yes, we do. However, I will say this: I am not sure, because I was not in office in 1966, that the same form was then used.

Q. I see. Where are the original of those bonds kept? A. As required by law, with the Treasurer of the State of Mississippi.

Q. All right, sir, and is Mr. Gurley's bond filed there? A. Yes, it is, sir.

By Mr. Burgin (Continuing):

All right, sir.

Your Honor, at this time I'd like to ask leave of the Court for permission to issue a subpoena returnable instanter for the Treasurer to produce the bond of Mr. Gurley, with the understanding that when it is produced we will ask for consent to withdraw the original and . . .

By the Court:

Hasn't Mr. Gurley pled and stated from the witness stand that he did execute such a bond?

By Mr. Burgin:

Yes, sir.

[191] By the Court:

I don't think the bond is in dispute at all.

By Mr. Burgin:

No, sir, but we think that it might be material for the Court to have before it the unconditional covenants of the bond to absolutely pay all tax liability for gasoline imported into the State of Mississippi.

By the Court:

Well, isn't that bond based on the requirements of the statute?

By Mr. Burgin:

It is, sir.

I'll withdraw the request.

By the Court:

All right, sir.

By Mr. Burgin (Continuing):

No further questions.

By the Court:

Any further questions, Mr. Davis?

By Mr. Davis:

We have no further questions.

By the Court:

All right. You may stand aside.

(Witness Excused).

[192] By Mr. Burgin:

It is stipulated and agreed by and between Counsel for both complainant and defendant that Cause No. 81,953 on the docket of this Court and Cause No. 82-374 on the docket of this Court be, and the same are hereby, consolidated for trial and ultimate decision by the Court, by agreement.

By the Court:

Is that satisfactory, Mr. Davis?

By Mr. Davis:

Yes, sir. We will so stipulate.

By the Court:

All right.

(Ten-minute recess taken at this point.)

By Mr. Burgin:

Your Honor, the defendant and cross complainant rests.

Defendant Rests.

By the Court:

All right, sir. Anything further, Mr. Davis?

By Mr. Davis:

Nothing further, Your Honor.
Both Sides Rest.

[193] By the Court:

If you gentlemen have no objection, the Court would like for you to submit briefs and authorities, and a general discussion.

The Court is frankly of the opinion that there is a whole lot more involved in a decision in this suit than this one particular case, and it is very important.

By Mr. Burgin:

Your Honor, the Court may rest assured of that.

(Off-the-record discussion followed at this point regarding time for filing briefs).

(This was all of the proceedings and testimony taken at the time and place indicated in the caption hereto).

[194] REPORTER'S CERTIFICATE

STATE OF MISSISSIPPI
COUNTY OF HINDS.

I, R. M. Godwin, Official Court Reporter for the Fifth Chancery Court District of Mississippi, certify that to the best of my skill and ability I reported the proceedings had and done upon the trial in the cause of W. M. GURLEY, d/b/a GURLEY OIL COMPANY, Complainant, vs. ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI, Defendant, No. 81-953 on the docket of the Chancery Court of the First Judicial District of Hinds County, Mississippi

COMBINED FOR TRIAL PURPOSES

with the cause of W. M. GURLEY, d/b/a GURLEY OIL COMPANY, Complainant, vs. ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI, Defendant, No. 82-374 on the docket of the Chancery Court of the First Judicial District of Hinds County, Mississippi, on January 21, 1972, and that the foregoing seventy (70) pages contain a full, true and correct transcript of my stenographic notes taken on said trial.

This, the 2nd day of February, 1972.

/s/ R. M. Godwin
Official Court Reporter

REFERENCE TO OPINION AND FINAL DECREE OF CHANCERY COURT

The Opinion of the Chancery Court of the First Judicial District of Hinds County, Mississippi, filed July 14, 1972, has been reproduced as Appendix B, pages 32-39, to the Petition for Writ of Certiorari.

The Final Decree and Judgment of the Chancery Court of the First Judicial District of Hinds County, Mississippi, filed July 28, 1972, has been reproduced as Appendix B, pages 40-42, to the Petition for Writ of Certiorari.

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

NOTICE TO COURT REPORTER TO TRANSCRIBE NOTES AND APPELLANT'S DESIGNATION OF RECORD

(Filed August 1, 1972)

TO: MISS KAY FERGUSON
Official Court Reporter
Fifth Chancery Court District
1201 Poplar Boulevard
Jackson, Mississippi

Dear Miss Ferguson:

W. M. GURLEY, d/b/a GURLEY OIL COMPANY, Complainant in the above styled and numbered cause, feeling aggrieved on account of the Final Decree and Judgment entered in this cause on July 28, 1972, dismissing the Bills of Complainant and Amendments thereto filed by the Complainant granting the relief sought by Cross-Complainant, Arny Rhoden, in the amount of $29,-131.19, together with statutory interest, and dissolving the injunction issued in Cause No. 82,374, hereby notifies you that he desires that you transcribe and file your stenographic notes of the trial and proceedings in the above styled and numbered causes for purposes of appeal.

Pursuant to and in accordance with the statutes of the State of Mississippi in such cases made and provided, W. M. Gurley hereby designates the following to be included in the record of this case for purposes of appeal to the Supreme Court of the State of Mississippi:

1. A copy of all pleadings and amendments thereto filed by the parties herein in both Cause No. 81,953 and Cause No. 82,374.

2. A copy of the Stipulation stipulated and agreed by and between counsel for the Complainant and Cross-Defendant, W. M. Gurley, and the Defendant and Cross-Complainant, Arny Rhoden, dated January 20, 1972.

3. A copy of all proceedings conducted by and before the Court prior to the taking of testimony in these causes.

4. A copy of all testimony of all witnesses who testified at the trial of these causes.

5. All exhibits and testimony introduced in evidence in the trial of these causes.

6. All documentary evidence introduced in the trial of these causes.

7. A copy of all motions, objections, rulings of the Court and other proceedings made in the course of the trial of these causes.

8. A copy of all Orders and Decrees of the Court entered in these causes.

9. A copy of the Final Decree and Judgment rendered and entered in these causes.

10. A copy of this Notice.

It is our intention by this designation to have the record of appeal include all of the record, proceedings, testimony, evidence and pleadings in this cause, excepting only the process, which may be omitted.

I would appreciate your acknowledging receipt of this Notice by signing the enclosed copy and returning to me in the self-addressed envelope.

Sincerely yours,

Thomas, Price, Alston, Jones & Davis

By /s/ Charles R. Davis
One of the Attorneys for W. M. Gurley

(Certificates of Service Omitted in Printing)

IN THE
CHANCERY COURT OF THE FIRST JUDICIAL
DISTRICT OF HINDS COUNTY, MISSISSIPPI

(Title Omitted in Printing)

APPEAL BOND

(Filed October 20, 1972)

STATE OF MISSISSIPPI)
)
COUNTY OF HINDS)

KNOW ALL MEN BY THESE PRESENTS:

W. M. GURLEY, d/b/a GURLEY OIL COMPANY, a sole proprietorship, located in West Memphis, Arkansas, but authorized to do business in the State of Mississippi, Principal, and THE TRAVELERS INDEMNITY COMPANY, Surety, duly authorized to do business in the State of Mississippi, are all held and are firmly bound unto Arny Rhoden, Commissioner, Chairman of State Tax Commission for the State of Mississippi, in the penal sum of Five Hundred and no/100 Dollars ($500.00), for which payment well and truly to be made, jointly and severally, bind ourselves, our successors and assigns forever.

The condition of the foregoing obligation is such that whereas, on July 28, 1972, the Chancery Court of the First Judicial District of Hinds County, Mississippi, rendered a Final Decree and Judgment in these causes, and the said W. M. Gurley, d/b/a Gurley Oil Company, being aggrieved by said Final Decree and Judgment, has asked and obtained an appeal to the Supreme Court of Mississippi without supersedeas.

Now, if the said W. M. Gurley, d/b/a Gurley Oil Company, shall prosecute this appeal with effect and shall pay all costs, including costs of the transcript, if the same be affirmed, then this obligation to be void; otherwise, to remain in full force and effect.

WITNESS OUR SIGNATURES, this the 18th day of October, 1972.

W. M. Gurley, d/b/a Gurley Oil Company
Principal

By /s/ Charles R. Davis
His Attorney

The Travelers Indemnity Company
Surety

By /s/ Thetis Meagher
Attorney-in-Fact and Resident Mississippi Agent

APPROVAL OF APPEAL BOND

The foregoing Appeal Bond approved this the 20th day of October, 1972.

/s/ Tom Virden
Chancery Clerk of Hinds County

By /s/ Jean Holmes D. C.

(Power of Attorney of Surety Omitted in Printing)

REFERENCE TO OPINION OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI

The Opinion of the Supreme Court of the State of Mississippi, filed January 28, 1974, has been reproduced as Appendix A, pages 21-31, to the Petition for Writ of Certiorari.

MANDATE OF THE SUPREME COURT OF THE STATE OF MISSISSIPPI

(April 25, 1974)

STATE OF MISSISSIPPI

To the Honorable the Chancery Court of Hinds County —Greetings:

WHEREAS, on the 28th day of January, 1974 (the same being a day of the regular term of our SUPREME COURT, begun and held in the Court room, in the Capitol, in the City of Jackson, in said State, on the 2nd Monday of September, in the year of our Lord, 1973, the following final Decree was rendered by our SUPREME COURT, to-wit:

No. 47,371

W. M. GURLEY D/B/A GURLEY OIL COMPANY

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of the First Judicial District of Hinds County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 28th day of July, 1972-be and the same is hereby affirmed. It is further ordered and adjudged and decreed that the

appellee do have and recover of and from the appellant the sum of $1,456.56 being damages at the rate of 5 per centum as allowed by statute and from the appellant and The Travelers Indemnity Company, surety on the appeal bond herein, all of the costs of this appeal to be taxed for which let proper process issue.

YOU ARE THEREFORE HEREBY COMMANDED, That such execution and further proceedings be had in said cause, as according to right and justice, and the judgement of our SUPREME COURT and the law of the land ought to be had.

WITNESS, the Hon. Robert G. Gillespie Chief Justice of our Supreme Court; also the signature of the Clerk and the Seal of said Court hereunto affixed, at office, at Jackson, this the 25th day of April, A. D., 1974.

/s/ Julia H. Kendrick, Clerk

By ...., D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1734

W. M. GURLEY d/b/a GURLEY OIL COMPANY,

Petitioner,

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. ....

W. M. GURLEY d/b/a GURLEY OIL COMPANY,
Petitioner,

VS.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

The Petitioner, W. M. Gurley, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Mississippi entered in this proceeding on January 28, 1974.

OPINION BELOW

The Opinion of the Supreme Court of the State of Mississippi, reported in 288 So.2d 868 (Miss. 1974), is attached hereto as Appendix A. The Opinion by the Chancery Court of the First Judicial District of Hinds County, Mississippi, is attached hereto as Appendix B.

JURISDICTION

The judgment of the Supreme Court of the State of Mississippi was entered on January 28, 1974. Timely Petition for Rehearing was denied on February 18, 1974, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 *U.S.C.*, § 1257(3).

QUESTIONS PRESENTED

1. Whether 26 *U.S.C.*, § 4081 imposes a federal excise tax on gasoline upon the seller, in the nature of a "privilege tax", or upon the buyer, consumer, in the nature of a "use tax", the latter of which would prevent a state from including such tax within its sales tax base, such tax having been merely collected by the gasoline dealer and held by him for the federal government.

2. Whether the imposition of a state sales tax on federal excise taxes collected and held by a gasoline dealer for the federal government is violative of (a) the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States; and (b) the federal government's constitutional immunity from taxation by a state.

3. Whether the imposition of Mississippi sales tax on Mississippi gasoline excise taxes collected and held by a gasoline dealer results in a deprivation of the gasoline dealer's property without due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States and *Mississippi Code of 1972, Annotated,* § 27-55-11. Also involved are Title 26, *U.S.C.*, §§ 4081 and 4082; and Title 28, *U.S.C.*, § 1257(3).

Constitutional Provisions:

1. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

"No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

"No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

3. Title 26, *U.S.C.*, § 4081, provides in part as follows:

"(a) In General—There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

4. Title 26, *U.S.C.*, § 4082, provides in part as follows:

"(a) Producer—As used in this subpart, the term 'producer' includes a refiner, compounder, blender, or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline, as well as a pro-

ducer. Any person to whom gasoline is sold tax free under this subpart shall be considered the producer of such gasoline."

5. Title 28, *U.S.C.*, § 1257, provides in part as follows:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

6. *Mississippi Code of 1972, Annotated,* § 27-55-11, provides in part as follows:

> "Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to 8 cents per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state, or received in this state for sale, use on the highways, storage, distribution, or for any purpose."

STATEMENT OF THE CASE

W. M. Gurley, d/b/a Gurley Oil Company, owns and operates five (5) gasoline stations in Mississippi, and sells gasoline on consignment basis to four (4) other Mississippi stations. Like many other independent dealers, Gurley purchases gasoline and diesel fuel from producers in other

states and transports these petroleum products with his own trucks to his own stations, where sales are made to the ultimate consumer, thereby eliminating the middleman and, consequently, placing his stations on a competitive basis with those supplied by the major oil companies.

On January 16, 1971, Petitioner filed suit to recover sales taxes improperly collected by the State of Mississippi on account of Respondent's inclusion of the state and federal excise taxes on gasoline within the gross proceeds of the sale for the purpose of computing sales tax liability of Petitioner on the retail sales of such gasoline. The State Tax Commission cross-complained for past sales taxes not paid; and the recoverable amounts were stipulated. If Petitioner won, he was to receive a $62,782.57 refund, and if he lost, his additional liability was determined to be $29,131.19. The State Tax Commission prevailed on all counts and Petitioner appealed to the Supreme Court of Mississippi on the grounds that neither state nor federal excise taxes should be subject to the state sales tax. The Mississippi Supreme Court conceded that there were conflicting decisions based upon similar fact situations (Footnotes 1 and 2 of Opinion), but affirmed the lower court's judgment that the federal and state excise taxes were imposed upon the producer or distributor as a privilege tax rather than on the user or consumer as a use tax. Subsequently, judgment was entered for the Respondent.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts with the Decisions of Other State Supreme Courts As to the Proper Interpretation of 26 U.S.C. § 4081.

In determining the validity of including the federal and state excise taxes on gasoline within the Mississippi sales tax base, the Mississippi Supreme Court had to first determine the nature of the excise taxes with regard to a determination of whether the seller or the consumer is the "real" taxpayer; that is, whether or not such excise taxes were taxes upon the seller for the privilege of selling gasoline or whether such taxes were upon the consumer in the nature of a use tax. If such taxes were upon the seller, then the seller might reflect the taxes in its sales price and the entire sales price might validly be charged with the five per cent (5%) Mississippi sales tax. If, however, as is contended by the Petitioner, the tax is upon the consumer, then the actual sales price charged by the seller would not include amounts collected from the consumer as excise taxes. These determinations must be made by examining the excise tax statutes.

It is Petitioner's initial contention that 26 *U.S.C.*, § 4081 clearly imposes the federal excise tax on gasoline upon the buyer, consumer, and such tax is a "use tax", thus preventing the State of Mississippi from including such tax within its sales base, as to do so would deprive the oil dealer of his property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. 26 *U.S.C.*, § 4081 provides as follows:

> "There is hereby imposed on gasoline *sold* by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon." [Emphasis added]

26 *U.S.C.*, § 4082 defines a producer within the meaning of the above quoted statute as:

"(a) *Producer*—As used in this subpart, the term 'producer' includes a refiner, compounder, blender, or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline as well as a producer. *Any person to whom gasoline is sold tax free shall be considered a producer of such gasoline.*" [Emphasis added]

In determining the application of the above mentioned sections to the business operations of the Petitioner, Gurley Oil Company, it is of utmost importance to note that he is one of many small independent oil dealers, who purchases his petroleum products directly from the producer and sells directly to the ultimate consumer. Therefore, no federal or state excise tax is charged to or passed on to Gurley Oil Company by a supplier or manufacturer who has already reflected the tax in his sales price. The only charge made by the manufacturer or supplier is the basic price of the gasoline.

In the usual major oil company operation, there is the involvement of a sale by the manufacturer or major oil company to a distributor, a sale by that distributor to a retail operator and a sale by that retail operator to the ultimate consumer. In such cases, the major oil company might render an invoice to the distributor or wholesaler which would contain the basic price of the gasoline plus federal excise tax which would be passed on to the distributor and, the distributor would then render an invoice to the retail operator which contains the federal excise tax on the sale of gasoline as a part of the price. Alternatively, the federal excise tax might not appear until the sale from the distributor to the retailer. In any event, however, the federal excise tax is remitted to the federal government

prior to the sale by the retail service station operator to the ultimate consumer in the case of major oil company operations, which is not the case with the operation of the Petitioner and others so situated. Thus, the word "sold" in § 4081 can only apply to the sale to the consumer, user and said tax is at that time collected from the buyer who is the taxpayer.

Based upon the above reasoning, Petitioner contends that the plain language of 28 *U.S.C.*, §§ 4081 and 4082 as applied to his business operation plainly dictates that the federal excise tax on gasoline is upon the consumer and not includable within the state sales tax base.

As further evidence that the federal excise tax is upon the consumer, Arthur N. Northrup in an article entitled "The Measure of Sales Taxes" in the *Vanderbilt Law Review*, Volume IX, at page 237, points out that the capacity of the seller is that of an agent for the collection of tax and not as the "real" taxpayer, as is evidenced by the following reasoning:

"(1) Failure to collect, account and pay over is a criminal offense.

"(2) The tax money is a fund in trust.

"(3) The registration and bond requirements of the producer are badges of agency.

"(4) The federal excise tax on gasoline sold attaches at the time of the sale by the producer. But the producer is required to file a return and pay over the tax to the United States on a quarterly basis. In the ordinary course of business, the producer receives payment in full from the purchaser before paying over the tax to the United States.

"(5) The exemptions [provided in 26 U.S.C. §§ 6420 and 6421, concerning sales to users for non-highway use] depend upon: (a) the identity or status of the purchaser; (b) what the purchaser is going to do with the product; (c) the identity or status of the ultimate purchaser to whom the purchaser sells the product; and (d) what the ultimate purchaser is going to do with the product."

The arguments heretofore discussed have been followed in several jurisdictions which have adopted the principle that a state sales tax cannot include the federal excise tax upon gasoline. *Tax Review Board of Philadelphia* v. *Esso, Standard Division*, 424 Pa. 355, 277 A.2d 657 (1967), *cert. denied* 389 U.S. 824, 19 L.Ed.2d 79, 88 S.Ct. 63; *Standard Oil Company* v. *State Tax Commissioner of North Dakota*, 71 N.D. 146, 299 N.W. 447, 135 A.L.R. 1481 (1941); *Gulf Oil Corp.* v. *McGoldrick*, 9 N.Y.S.2d 544 (1939); *Kesbec, Inc.* v. *Taylor*, 2 N.Y.S.2d 241 (1938); *Standard Oil Company* v. *State*, 283 Mich. 85, 276 N.W. 908 (1937); *Socony Vacuum Oil Company* v. *New York*, 287 N.Y.S. 288 (1936).

Of the above cited cases, a discussion of *Standard Oil Company* v. *State, supra*, decided by the Supreme Court of Michigan in 1937, and *Tax Review Board of Philadelphia* v. *Esso, Standard Division, supra*, decided in 1967 by the Supreme Court of Pennsylvania, would seem to be most helpful in the Court's determination of the case at bar given the facts herein. In *Standard Oil* v. *State*, the Michigan Supreme Court considered the exact question presented in this case. By their decision the Court determined that the sales tax levied by the State of Michigan could not include in its tax base federal excise tax collected on the retail sales of gasoline.

In reaching this decision, the Court noted that the plaintiff made retail sales as a producer directly to the consumer without any prior sale to any immediate distributor. The Court interpreted the plain language of the federal excise tax statute as indicating that said tax was a tax on the sale of gasoline, and, given that logical interpretation, made the following statement:

> "In view of the fact that the federal excise tax and the state sales tax attach at the instant a sale is made, it follows that the federal tax has not become a part of the sale price, but is a fund, which when collected is payable by the manufacturer to the federal government. Such fund does not become a part of the 'gross proceeds' realized by the manufacturer from the sale, and is not subject to taxation within the meaning of Act No. 167, Pub. Acts 1933. [The Michigan Sales Tax Act]"

The decision of the Pennsylvania Supreme Court in 1967 in the case of *Tax Review Board of Philadelphia* v. *Esso, Standard Division, supra*, reiterates and amplifies the logic of *Standard Oil* v. *State*. The Pennsylvania Supreme Court likewise decided that a sales tax levied by the City of Philadelphia which included the federal excise tax in its base was illegal. In reaching this conclusion, the Court made the following statement:

> ". . . However, it is our considered conclusion that the operative word in § 4081 of the Internal Revenue Code, supra, is 'sold' and the particular levy is a sales tax pure and simple. Further, the nature, the size of the tax in relation to the wholesale price of the product, and the purpose thereof compel the conclusion, that it is not and never was intended to be imposed upon the producer, but rather upon the purchaser, the user and prime beneficiary of the facilities that the tax

pays for and makes possible. The producer's responsibility is limited to seeing that it is paid; hence realistically and logically it is nothing more than a collector thereof.

"The revenue collected as a result of the tax does not go into the general treasury. Instead it is placed in a special fund and is used solely to defray the cost of the federal highway system. It was designed to charge the motorists, who use the highways, with the cost thereof. It has been recognized and characterized by both the President and Congress of the United States as 'user tax'. Moreover, this conclusion is fortified by Section 6420(a) of the Code itself, which provides for a refund to the purchaser if the gasoline is used on a farm for farm purposes.

"[5] Our ruling is supported by analogous federal court decisions. See, Panhandle Oil Co. v. State of Mississippi ex rel. Knox, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928); Indian Motorcycle Co. v. United States, 283 U.S. 570, 51 S.Ct. 601, 15 L.Ed. 1277 (1931). See also, Standard Oil Co. v. State, 283 Mich. 85, 276 N.W. 908 (1937); Standard Oil Co. of Indiana v. State Tax Commissioner of State of North Dakota, 71 N.D. 146, 299 N.W. 447, 135 A.L.R. 1481 (1941); and, Esso Standard Oil Co. v. City of Danville, 45 C.L.O. 358, App. Court of Danville, Va. (1950). It is also in line with a multitude of our own decisions:

> " 'It is fundamental that taxing statutes and ordinances must be strictly construed and if there is any reasonable doubt as to the meaning intended, the doubt must be resolved in favor of the taxpayer and against the taxing authority: (citing cases).' Don Allen Chevrolet Co. v. City of Pittsburgh, 414 Pa. 429, 433, 200 A.2d 388 (1964). See also, Tax

Review Board v. Green, 409 Pa. 448, 187 A.2d 572 (1963)."

The above authorities clearly indicate that the federal excise tax must be construed as a use tax upon the consumer and, therefore, should not be included in the state sales tax base.

However, a number of the jurisdictions considering the question have concluded to the contrary. *Sun Oil Co.* v. *Gross Income Tax Division*, 238 Ind. 111, 149 N.E.2d 115 (1958); *State of Georgia* v. *Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E.2d 224 (1970), *affirmed* by the Georgia Appellate Court in 226 Ga. 883, 178 S.E.2d 173 (1970), and *Martin Oil Service, Inc.* v. *Department of Revenue*, 49 Ill.2d 260, 273 N.E.2d 823 (1971), *cert. denied* 405 U.S. 923, 30 L.Ed.2d 794, 92 S.Ct. 691 (1972). *Pure Oil Company* v. *State of Alabama*, 244 Ala. 258, 12 So.2d 861, 148 A.L.R. 260 (1943). It is apparent that there is substantial diversity among the various state Courts regarding the interpretation of 26 *U.S.C.*, , 4081, et seq., which is as aforesaid, the basis of this Petitioner's claim of exemption under the Mississippi sales tax laws. It is also apparent that there will continue to be a conflicting interpretation until this issue is ruled upon by this Court.

2. The Imposition of a State Sales Tax on a Federal Excise Tax Violated Petitioner's Right to Equal Protection under the Laws, Deprived Him of His Property Without Due Process of Law, and Violated the Federal Government's Sovereign Immunity from State Taxation.

In his article entitled "The Measure of Sales Taxes", cited *supra*, page 8, Arthur N. Northrup presents a logical argument for the overall invalidity of a state sales tax on federal excise tax funds, which argument was used by

the Indiana Supreme Court in preventing gross income taxation of a producer of gasoline on amounts collected as federal excise tax:

"I. The federal excise tax on gasoline sold by producer is a tax upon the sale, not upon the manufacturer.

"II. The federal excise tax on gasoline sold by producer is not a part of his sale price.

"III. The federal excise tax on gasoline sold by producer is intended to be, and is, a tax upon the purchaser to be paid and borne by the purchaser.

"IV. The producer is the collector of the federal excise tax on gasoline sold by a producer and is the agent of the United States for the purpose of such collection.

"Based upon the foregoing analysis:

"V. Amounts received and collected by the producer and accounted for and paid over by it to the United States as and for federal excise tax on gasoline sold are not subject to tax under the provisions of the Indiana Gross Income Tax Act.

"VI. To subject such amounts to taxation by the State of Indiana would be to tax (a) monies collected and held as taxes and revenues of the United States, and (b) the collection of such taxes and revenues by an agent and instrumentality of the United States for such collection, in violation of the constitutional immunity of such revenues and such agency from such taxation under the Constitution of the United States.

"VII. To subject such amounts to taxation by the State of Indiana would be to tax gross receipts of the United States as, and as if they were, gross receipts

of the producer and would, therefore, deprive the producer of its property without due process of law and deprive the producer of equal protection of the laws, in contravention of the Fourteenth Amendment to the Constitution of the United States."

3. The Imposition of the Mississippi Sales Tax on the Amounts Collected As Mississippi Gasoline Excise Tax Constitutes the Taking of His Property Without Due Process of Law in Contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Mississippi gasoline excise tax, like the federal excise tax on gasoline, is clearly upon the consumer, and the taxing of such funds collected from the consumer-taxpayer and belonging to the State of Mississippi is a clear taking of Petitioner's property under the color of state law without the due process afforded under the Constitution of the United States.

In support of the above position, Petitioner would state that this Court has previously ruled upon this very question. In *Panhandle Oil Co.* v. *Mississippi, ex rel. Knox,* 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928) this Court determined that the Mississippi gasoline excise tax was upon the consumer. The Mississippi excise tax law has not been changed in any relevant respect since the rendering of that decision. The Mississippi Supreme Court began the discussion of its reasoning behind its position on this point with a consideration of *Panhandle Oil Co.* v. *Mississippi, ex rel. Knox, supra.* The Mississippi Court correctly noted that *Panhandle* arose out of an attempt on the part of the State of Mississippi to collect excise taxes for the sale of gasoline *to the United States* for its operation of the United States Coast Guard Fleet and the Veterans Hospital. It

further recognized that the United States Supreme Court held that the state excise tax was on the consumer and since the federal government was the consumer, the state could not collect this tax. The Mississippi Court, however, felt that *Panhandle* was no longer viable under subsequent rulings of this Court.

Petitioner would contend that the *Panhandle* holding is still applicable here despite the later case of *Alabama* v. *King & Boozer,* 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941) cited by the Mississippi Court in its opinion. It was noted by the Mississippi Supreme Court that King & Boozer sold lumber to contractors for their use in constructing an army camp for the United States, said lumber being sold on a "cost plus a fixed fee" basis.

The issue in *King & Boozer* was essentially the same issue as presented in the *Panhandle* case, *supra,* that being the infringement of any constitutional immunity of the United States from state taxation. However, this Court decided that case based on a difference in the facts from those existing in *Panhandle.* The Mississippi Supreme Court correctly noted that, "the Supreme Court held that the contractors and not the United States were the purchaser of the lumber." This Court found that, unlike the situation in *Panhandle,* where the government was obviously the direct purchaser of the gasoline, King & Boozer were private individuals and since they were the purchasers of the lumber they were responsible for sales tax thereon regardless of the fact that the United States bore the economic burden of said tax.

The *King & Boozer* case in no way tampered with the basic reasoning in *Panhandle,* and it certainly did not attempt to overrule its determination of the nature of the Mississippi excise tax on gasoline as it was stated in *Panhandle.* The sole deciding factor necessitating a different decision

from *Panhandle* was the fact that a private individual and not the government was the purchaser. Thus, *King & Boozer* was cited by the Mississippi Supreme Court as follows:

> "The asserted right of one to be free of taxation by the other [government against state] does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Mississippi and Graves v. Texas Co., *supra,* [298 U.S. 393, 56 S.Ct. 818, 80 L.Ed. 1236], we hold it no longer tenable. 314 U.S. at 9, 62 S.Ct. at 45, 86 L.Ed. at 6."

It should be noted that the basic holding in *Panhandle* in no way deals with "the asserted right of one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the government and who have been granted no tax immunity." *Panhandle* dealt with a direct sale of gasoline to the government. Any theories concerning added costs attributable to the taxation of those furnishing supplies to the government do not conflict with the basic holding of *Panhandle,* and this basic holding is not attacked in the *King & Boozer* case.

The case of *Kern-Limerick Inc.* v. *Scurlock,* 347 U.S. 110, 74 S.Ct. 403, 98 L.Ed. 546 (1954), supports the above position and was considered by the Mississippi Court. In *Kern-Limerick,* a contractor purchased tractors for use in constructing the ammunition dump for the United States. Once again, the Mississippi Court correctly stated the issue as follows:

"The question for decision was whether the contractor or the United States was the true purchaser for purposes of payment of the Arkansas gross receipts tax." 288 So.2d at 872.

In *Kern-Limerick,* this Court held that the United States was the true purchaser and, therefore, the tax was upon the United States in violation of the Constitution. The Mississippi Supreme Court correctly stated:

"... The reason the Court reached a different result in *Kern-Limerick* was that it found that the economic burden *and* the legal incidence of the tax fell on the United States, whereas in *King and Boozer,* the Court found that although the economic burden of the tax was on the United States, the legal incidence of the tax fell on the contractor." 288 So.2d at 872.

The deciding factor in *Kern-Limerick* was that the United States was the purchaser and, therefore, the direct taxpayer. In *Panhandle,* there was no question but that the government directly purchased the gasoline and was, therefore, the taxpayer. At no time has the Supreme Court of the United States altered its determination that the Mississippi gasoline excise tax was upon the consumer. As stated, even in the *King & Boozer* case, there was no alteration of this position.

Petitioner, therefore, contends that with the added support of the decision in *Kern-Limerick,* all doubt is removed that the basic holding in *Panhandle* concerning the nature of the Mississippi gasoline excise tax is still viable. Therefore, this Court having determined that the legal incidence of the Mississippi gasoline tax was on the consumer, and the tax in all essential respects being the same as it was at the time of the *Panhandle* decision, there can be no doubt that *Panhandle* stands as authority that the Mississippi

gasoline excise tax is upon the consumer and, therefore, is not includable within the gross proceeds of sale for Mississippi sales tax purposes.

In summary, we submit that the Writ should be granted here so the Court can rule on the proper interpretation of federal law, thereby preventing future conflicting interpretations by state and lower federal Courts. We submit also that the Court should reverse the holding that Mississippi, or any other state, may impose a sales tax upon a state or a federal excise tax on gasoline.

CONCLUSION

For the foregoing three reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Mississippi.

Respectfully submitted,

WALTER P. ARMSTRONG, JR.
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Memphis, Tennessee 38103

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Jackson, Mississippi 39205

Counsel for Petitioner

Date: May 17th, 1974.

CERTIFICATE OF SERVICE

I, Walter P. Armstrong, Jr., one of the counsel for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of May, 1974, I served copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court for the State of Mississippi on all parties required to be served, by depositing a copy of said Petition in the United States Post Office, properly addressed, with first class postage prepaid, to Mr. James H. Haddock, 214 Woolfolk State Office Building, Jackson, Mississippi 39201, and to Mr. William G. Burgin, Jr., Post Office Box 32, Columbus, Mississippi 39701, Attorneys of record for Respondent.

WALTER P. ARMSTRONG, JR.

APPENDIX A

W. M. GURLEY, d/b/a Gurley Oil Company

v.

Arny RHODEN, Commissioner, Chairman of State Tax Commission.

No. 47371.

Supreme Court of Mississippi.

Jan. 28, 1974.

Rehearing Denied Feb. 18, 1974.

A suit to recover state sales taxes and a suit to enjoin the State Tax Commission from collecting sales taxes on retail sales of gasoline made at certain nonowned retail grocery stores were consolidated for trial. Judgment was entered against the taxpayer by the Chancery Court, Hinds County, J. C. Stennett, C., and the taxpayer appealed. The Supreme Court, Rodgers, P. J., held that the incidence of federal and state excise taxes on the sale of gasoline is upon the producer, and such federal and state excise taxes are properly includable as part of gross proceeds of sales for purpose of computing the state sales tax liability on the retail sale of gasoline.

Affirmed.

1. Internal Revenue (Key) 1143
Taxation (Key) 1295

Incidence of federal and state excise taxes on sale of gasoline is upon the producer. 28 U.S.C.A. § 4081; Code 1972, §§ 27-55-11, 27-65-1 et seq.; 26 U.S.C.A. (I.R.C.1954) § 4081; Code 1942, § 10013-06.

2. Taxation (Key) 1284

Federal and state excise taxes on sale of gasoline are properly includable as part of gross proceeds of sales for purpose of computing state sales tax liability on retail sale of gasoline. 28 U.S.C.A. § 4081; Code 1972, §§ 27-55-11, 27-65-1 et seq.; 26 U.S.C.A. (I.R.C.1954); § 4081; Code 1942, § 10013-06.

Thomas, Price, Alston, Jones & Davis, David H. Nutt, Jackson, Hubert A. McBride, Memphis, Tenn., for appellant.

Taylor Carlisle, Jackson, William G. Burgin, Jr., Columbus, for appellee.

RODGERS, Presiding Justice.

This is an appeal from the Chancery Court of the First Judicial District of Hinds County, Mississippi, by Gurley Oil Company. Gurley filed suit originally to recover state sales taxes allegedly collected improperly because of the inclusion of federal and state excise taxes within gross proceeds of sales. Subsequently, appellant brought another suit in the same court seeking to enjoin the State Tax Commission from collecting sales taxes on retail sales of gasoline made at certain non-owned retail grocery stores in this state. The two suits were consolidated for trial. Both parties stipulated the amounts recoverable, should the court rule in their favor. The chancellor entered a final decree on July 28, 1972, finding Gurley not to be entitled to the relief for which he prayed. The court ordered the prayer for refund dismissed and refused to enjoin the Tax Commission. Judgment was entered against the complainant, Gurley, in the amount of twenty-nine thousand one hundred thirty-one dollars and nineteen cents ($29,131.19), since that amount was stipulated to be the amount of tax due.

Gurley now appeals and assigns as error the following: The lower court erred as a matter of law in dismissing appellant's bill of complaint for sales tax refunds based upon its determination that the Mississippi excise tax on gasoline and the federal excise tax on gasoline were properly includable within the gross proceeds of sales upon which the Mississippi sales tax on gasoline is based.

These are the facts: W. M. Gurley, d/b/a Gurley Oil Company, operates as an importer, distributor and retailer of gasoline, diesel fuel, and petroleum products. His office and principal place of business is located in West Memphis, Arkansas. Gurley owns and operates five (5) retail service stations in Mississippi and also sells gasoline through several grocery store locations in Mississippi on a consignment basis. Gurley is qualified as a distributor of gasoline with the Mississippi Motor Vehicle Comptroller. He imports into this state gasoline and diesel fuel which he purchases from producers in Arkansas and Tennessee, and distributes this fuel for sale at his retail stations and consignment locations.

The federal excise tax on the sale of gasoline [26 U.S.C.A. § 4081] is paid twice monthly by Gurley, based on the number of gallons sold in the time period involved.

The Mississippi excise tax on gasoline is paid by Gurley on a monthly basis, also calculated by a charge per number of gallons sold.

The State Tax Commission collected a five percent (5%) sales tax on the gross proceeds of sale from Gurley's retail stations on all merchandise sold, including gasoline and oil. Gurley then initiated this action against the State Tax Commission to recover a portion of the sales taxes, alleging that the federal and state excise taxes on the sale of gasoline were improperly included within the gross proceeds of sales for purposes of computing the sales tax.

[1, 2]. The question presented is whether or not the federal and state excise taxes on the sale of gasoline are included as part of gross proceeds of sales for the purpose of computing sales tax liability of appellant on the retail sale of such gasoline. It is argued that the determinative issue is whether or not the federal and state excise taxes are imposed on the seller/producer for the privilege of selling gasoline or whether or not the tax is upon the consumer in the nature of a use tax. It is said that if the taxes fall upon the consumer or the incidence of the sale by the retailer to the consumer, they should not be included as part of the retail sale price for computing the State's sales tax. If, on the other hand, the tax is imposed upon the producer at a time prior to the point of retail sale or other consumer transaction, it is an element of the cost of the property sold and should be included as part of the retail sale price for calculating the sales tax.

Although the federal and state excise taxes on gasoline are similar in form and purpose, they are more properly considered separately for purposes of discussion.

First—let us consider whether, under the provisions of the Mississippi Sales Tax Law, the federal excise tax on gasoline sold by appellant is properly includable as a part of the gross proceeds of sales. The Mississippi Sales Tax, Sections 10103 et seq., Mississippi Code 1942 Annotated (Supp.1972) [now Mississippi Code Annotated § 27-65-1 et seq. (1972)] imposes a tax equal to five percent (5%) of the gross proceeds of the retail sales of any business within the State of Mississippi selling any tangible personal property.

The federal excise tax on gasoline is found in 26 U.S.C.A. § 4081; "There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

The precise issue is whether or not the federal excise taxes collected pursuant to § 4081, *supra,* are subject to sales tax by the State of Mississippi.

The appellant's position is that the federal excise tax is intended to be a use tax with the incidence of the tax falling on the consumer/purchaser. It is argued that the congressional intent behind the Excise Tax Reduction Act of 1965 supports this position.

There seems to be a division of authorities as to whether or not the federal excise tax is a use tax with the incidence falling on the purchaser of gasoline, or whether or not it is to be considered as a part of the cost of the merchandise.

Some of the courts hold that the tax is not on the gasoline itself, nor on the producer/manufacturer, nor part of the cost or gross receipts of the seller, but falls upon the buyer/consumer.[1] On the other hand, other courts have concluded that the federal excise tax must be included in the gross receipts as a part of the cost base of the merchandise for the purpose of determining the amount of the state sales tax.[2]

Second—let us now consider whether or not the Mississippi excise tax falls on the producer or the customer/consumer under our Mississippi law. Section 10013-06,

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1. Tax Review Board of Philadelphia v. Esso Standard Division of Humble Oil and Refining Co., 424 Pa. 355, 227 A.2d 657 (1967); Standard Oil Co. v. State Tax Com'r, 71 N.D. 146, 299 N.W. 447 (1941); Standard Oil Company v. State, 283 Mich. 85, 276 N.W. 908 (1937); Indian Motorcycle v. United States, 283 U.S. 570, 51 S.Ct. 601, 75 L.Ed. 1277 (1930).

2. Martin Oil Service, Inc. v. Department of Revenue, 49 Ill.2d 260, 273 N.E.2d 823 (1971); State v. Thoni Oil Magic Benzol Gas Stations, Inc., 121 Ga.App. 454, 174 S.E.2d 224 (1970); Sun Oil Company v. Gross Income Tax Division, 238 Ind. 111, 149 N.E.2d 115 (1958); Pure Oil Company v. State, 244 Ala. 258, 12 So.2d 861 (1943).

Mississippi Code 1942 Annotated (Supp.1972) was effective until January 1, 1970, but at that time Section 10076-05, Mississippi Code 1942 Annotated (Supp.1972) was enacted so as to increase the amount of excise tax to eight cents (8¢) per gallon. The foregoing tax was brought forward into the Mississippi Code 1972 Annotated as § 27-55-11. The first and last paragraphs of this section are as follows:

> "Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to eight cents per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose.
>
> * * *
>
> With respect to distributors or other persons who bring, ship, have transported, or have brought into this state gasoline by means other than through a common carrier, the tax accrues and the tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when and at the point where such gasoline is brought into the state." Miss.Code Ann. § 27-55-11 (1972).

A study of the state excise tax indicates that it, like the federal excise tax, has undergone a vacillating travail.

In the case of Panhandle Oil Company v. Mississippi ex rel. Knox, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928), the State of Mississippi attempted to collect excise taxes for the sale of gasoline to the United States for its operation of the United States Coast Guard fleet and the Vet-

erans Hospital. The case was appealed to the United States Supreme Court, and in a 4 to 3 decision, that Court held that the state excise tax was on the consumer and since the federal government was the consumer, the State could not collect this tax.

Mr. Justice Holmes wrote a strong dissent in which he asserted that the incidence of the tax was on the seller.

The *Panhandle* case, *supra*, was apparently overruled in the case of Alabama v. King and Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3 (1941).[3] In this case, the respondents King and Boozer sold lumber on the order of "cost-plus-a-fixed-fee" contractors for their use in constructing an army camp for the United States.

The issue there was whether or not the Alabama sales tax, with which the seller was chargeable, but which he was required to collect from the buyer, infringed any constitutional immunity of the United States from state taxation. The Supreme Court held that the contractors and not the United States were the purchaser of the lumber. The reasoning in the *Panhandle* case was considered by the Supreme Court in the *Alabama* case, *supra*, and was found to be no longer tenable. *See* United States v. Sharp, D.C., 302 F.Supp. 668 (1969).

Appellant argues, however, that *Panhandle* was reinstated by the United States Supreme Court in the case of Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 74 S.Ct. 403, 98 L.Ed. 546 (1954), an Arkansas case.

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3. Justice Stone [one of the dissenting justices in *Panhandle*] had this to say for the majority of the court: "The asserted right of one to be free of taxation by the other [government against state] does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Mississippi and Graves v. Texas Co., *supra* [298 U.S. 393, 56 S.Ct. 818, 80 L.Ed. 1236], we hold it no longer tenable." 314 U.S. at 9, 62 S.Ct. at 45, 86 L.Ed. at 6.

The facts in *Kern-Limerick, supra,* are somewhat similar to the *King and Boozer* case, *supra*, but the property purchased in the Arkansas case became the property of the United States. A contractor purchased tractors for use in constructing an ammunition dump for the United States. The question for decision was whether the contractor or the United States was the true purchaser for purposes of payment of the Arkansas Gross Receipts Tax. Mr. Justice Reed, writing for the majority, found *King and Boozer* to be distinguishable. The Court said:

> "We find that the purchaser under this contract was the United States. Thus, King & Boozer is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall in the independent contractor and not upon the United States." 347

U.S. at 122, 74 S.Ct. at 410-411, 98 L.Ed. at 556-557. Since the United States was the true purchaser under that contract, the doctrine of sovereign immunity prevented Arkansas from applying its tax.

Contrary to appellant's assertions, the *Kern-Limerick* case does not specifically cite *Panhandle* in support of its decision, nor does it seem to change the effect of the *King and Boozer* decision. The reason the court reached a different result in *Kern-Limerick* was that it found that the economic burden *and* the legal incidence of the tax fell on the United States, whereas in *King and Boozer*, the Court found that although the economic burden of the tax was on the United States, the legal incidence of the tax fell on the contractor. Therefore, the appellant's contention that the *Panhandle* case was revived by *Kern-Limerick* must fail, since the Court still holds that where only the economic burden (and not the legal incidence) of a tax falls on the United States, the doctrine of sovereign immunity is not applicable.

The appellant earnestly argues that the Mississippi Supreme Court has previously passed upon the issue here submitted in the case of State v. Republic Oil Refining Co., 202 Miss. 688, 32 So.2d 290 (1947), since the writer of that opinion referred to the state excise tax as a "use tax". That issue was not before the court in the *Republic Oil Refining Co.* case and is *obiter dictum* without study, and is not authority on the issue here involved.

We do not consider that the cases of American Oil Company v. Mahin, 49 Ill.2d 199, 273 N.E.2d 818 (1971); State v. Thoni Oil Magic Benzol Gas, Inc., 121 Ga.App. 454, 174 S.E.2d 224 (1970); Socony-Vacuum Oil Co. v. City of New York, 247 App.Div. 163, 287 N.Y.S. 288 (1936); nor Kesbec, Inc. v. Taylor, 253 App.Div. 353, 2 N.Y.S.2d 241 (1938) are authority for the contention of the appellant that the incidence of the excise tax in Mississippi falls on the consumer/purchaser, because all of these cases are based upon state statutes, some of which expressly make the producer the tax collector for the state. For example, the Georgia Code Annotated § 92-1403(C) reads: "No person who sells motor fuel in this State shall absorb the taxes imposed by this chapter on the motor fuel sold . . ."

This brings us to the two cases more nearly in line with the consensus of this Court. In the case of United States v. Sharp, D.C., 302 F.Supp. 668 (1969), previously cited, the United States filed suit to obtain a declaratory judgment against Mississippi declaring that the gasoline tax imposed on gasoline distributors for gasoline purchased by the federal government was void. A three-judge court held that the Mississippi tax and federal excise tax on gasoline were not taxes on the consumer, and did not afford immunity to the United States except where specified exemptions were granted the United States.

Finally—in the case of Martin Oil Service, Inc. v. Department of Revenue, 49 Ill.2d 260, 273 N.E.2d 823 (1971), the Supreme Court of Illinois had before it the identical question under similar facts, and apparently, identical arguments were made as to the occupational tax of that state and the excise tax of the federal government. The trial court held the producer liable. In *Martin, supra,* the court said:

> "Our conclusion that an increase in the sales price caused by the Federal gasoline tax is not deductible by any retailer, including a producer-retailer, from the gross receipts makes it unnecessary for us to consider whether a preference given a producer-retailer in this regard would be constitutional.
>
> For the reasons given, the judgment of the circuit court of Cook County is affirmed." 49 Ill.2d at 269, 273 N.E.2d at 829.

In *Martin, supra,* the court pointed out that:

> "The operative words of the Federal statute are: 'There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon.' (26 U.S.C. sec. 4081) A sale from a producer to another licensed producer is exempted from the tax. (26 U.S.C. sec. 4083) It is not disputed that the duty to remit the tax is on the producer." 49 Ill.2d at 261-262, 273 N.E.2d at 825.

The court went on to illustrate its conclusion that the incidence of the federal excise tax fell on the producer rather than the consumer/purchaser as follows:

> "The validity of this view can be illustrated by the consideration that if the tax is not paid by the producer, he is the only one from whom the government

may seek to collect the tax. Significantly the statute does not impose any liability on the purchaser-consumer if the gasoline tax is not remitted by the producer. It is irreconcilable to say that the legal incidence of the tax is on the consumer-purchaser and to say that he is not liable for the tax." 49 Ill.2d at 263, 273 N.E.2d at 826.

We are also convinced that the incidence of both the federal and the state excise tax falls upon the producer. In fact, Mississippi Code Annotated § 27-55-11 (1972) states that the tax accrues and the tax liability attaches on the distributor . . . for each gallon of gasoline brought into the state.

We must conclude, therefore, that the trial court was correct in refusing to order a refund of sales taxes previously paid by Gurley. The court was also correct in refusing to enjoin the Mississippi State Tax Commission from the collection of the sales tax from W. M. Gurley since the incidence of the federal and state excise tax burden fell upon him. The judgment in favor of the Mississippi State Tax Commission against the appellant, W. M. Gurley, is hereby affirmed.

Affirmed.

PATTERSON, SMITH, ROBERTSON and SUGG, JJ., concur.

APPENDIX B

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 81,953

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Complainant and Cross-Defendant,

v.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Defendant and Cross-Complainant.

Consolidated with No. 82,374

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Complainant,

v.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Defendant.

OPINION OF THE COURT

Cause Number 81,953 was brought by Complainant and Cross-Defendant Gurley to recover sales taxes collected by the Tax Commissioner on account of alleged improper, erroneous and illegal inclusion of federal and state excise taxes on the sale of gasoline with the gross proceeds of sale for the purpose of computing sales tax liability of Complainant on the retail sale for such gasoline.

On March 9th, 1971, the Complainant Gurley brought Cause Number 82,374 in this Court, seeking an injunction

against the State Tax Commissioner enjoining him from collecting or attempting to collect sales taxes on alleged retail sales made by the Complainant at certain non-owned retail grocery stores in the state of Mississippi. An interlocutory injunction was authorized and issued by this Court against the Commission, enjoining the collection of such sales taxes from the Complainant.

Counsel for the Complainant and Defendant stipulated as to the amount to be recovered by Complainant in the event of a decision by this Court in his favor and stipulated as to the amount of additional taxes due from Complainant to the Defendant in the event of a decision by this Court in favor of the Defendant. On the trial on the merits, the Court took the matter under advisement and requested briefs by the parties. Prior to the trial, Cause Number 81,953 and Number 82,374 were consolidated for trial.

According to the evidence in this cause, the Complainant W. M. Gurley, doing business as Gurley Oil Company, is engaged in business as an importer, distributor and retailer of gasoline, diesel fuel and related petroleum products. His principal office is in West Memphis, Arkansas, and he owns five retail service stations in Mississippi at Nesbitt, Olive Branch, Byhalia, Potts Camp and Walnut. He also distributes to and sells gasoline through several grocery store locations in Mississippi on a consignment basis, which account for approximately ten to twelve percent of the company's gross sales.

Complainant Gurley applied for and obtained a permit from the Mississippi Motor Vehicle Comptroller as a "Distributor of Gasoline, Diesel Fuel, Kerosene or Oil", being Permit Number 447 and Exhibit D-2 in evidence, and posted a bond as such distributor in the amount of $16,000 conditioned upon full payment to the Comptroller of all

excise taxes levied on gasoline, diesel fuel and oils under the provisions of Chapter 264, Laws of 1946, as Amended. By virtue of this permit and under its authority and bond, Complainant Gurley imported into the state of Mississippi in his trucks gasoline and diesel fuel purchased from producers in Arkansas and Tennessee and distributed the same for sale by his employees at his retail stations and by his consignees at the consignment locations. He is likewise qualified as a distributor of gasoline with the Internal Revenue Service and pays the federal excise tax to Internal Revenue Service thereon.

At Complainant's retail stations, the gross sales price per gallon of gasoline was shown on pumps to be approximately 30.9¢ for regular and 32.9¢ for ethyl, and the total gross sale to the customer shown on the pump was the gross pump price multiplied by the number of gallons purchased. The gross sales price at the pump at the consignment locations was such amount as Gurley directed and included commissions which, by contract, would accrue upon sale to the consignee. The posted pump price included federal and state excise taxes.

Gurley testified that for the period from 1960 until a short time ago he reported and computed his Mississippi sales taxes on returns filed on the basis of a gross sales price of 23.5¢ per gallon. He further contended that if federal and state excise taxes were excluded from the determination of his tax liability, the sales price subject to sales tax would be 20¢ per gallon, and his claim for refund of $19,542.67 referred to in the stipulation for the period from September 1, 1965 to August 31, 1971 is based on this differential.

It was further stipulated by and between counsel for the parties the following:

1. That during the period from September 1, 1965 through August 31, 1971, Complainant and Cross-Defendant sold gasoline within the state of Mississippi, which sales of motor fuel were subject to Mississippi state sales tax in accordance with the provisions of Section 10104, et seq. of the Mississippi Code of 1942, Recompiled.

2. That the primary issue in controversy between the parties herein is whether, under the provisions of the Mississippi Sales Tax Law referred to above, the taxes levied by the United States under the provisions of Section 4081 of the United States Internal Revenue Code of 1954 (26 U.S.C.A. Sec. 4081), and the taxes levied under the provisions of Section 10013-01, et seq. of the Mississippi Code, Recompiled (for the period ending January 1, 1970), and by Section 10076-01, et seq. of said Code (for the period from January 1, 1970 through August 31, 1971), on the gasoline sold by Complainant and Cross-Defendant, are properly includable within gross proceeds of sales for the purpose of computing the sales tax liability of Complainant and Cross-Defendant for the periods involved.

3. That if the federal excise tax on gasoline and the Mississippi state excise tax thereon are not legally includable in gross proceeds of sales subject to the sales tax, then, subject to the reservations hereinafter set forth, the Complainant would be entitled to recover from the Defendant the following amounts heretofore paid by said Complainant for the respective periods indicated.

a. The sum of $14,981.23 paid on April 14, 1969 by said Complainant as the result of an additional sales tax assessment (which includes penalties and interest thereon) made by Defendant against him for the period beginning September 1, 1965 through January 31, 1969.

b. The additional sum of $27,390.91 paid by Complainant to Defendant as the result of an additional assessment of sales taxes (which includes penalties and interest accruing thereon) under a jeopardy warrant for the period from February 1, 1969 through August 31, 1970, such payment having been made by Complainant on November 10, 1970.

c. The additional sum of $19,542.67, being that portion of sales tax payments made by Complainant to Defendant for the period from September 1, 1965 through August 31, 1971, under protest, which would not have been due or payable had the federal and state excise taxes on gasoline been excluded from gross proceeds of the sales of such products by Complainant in computing his sales tax liability for said period, the computation of which amount is more particularly itemized and shown as Exhibit "A" hereto attached consisting of fourteen (14) pages which cover the entire period of time shown above.

d. The additional sum of $867.76, being costs of collection of the jeopardy warrant referred to in subparagraph 3b above.

4. That payment of the amount specified and set forth in paragraph 3c above (if the Court should determine that such state and federal excise taxes are not legally includable in gross sales) shall be subject to the Court's decision of the question of whether all or any portion of the amount therein mentioned is barred under the provisions of Section 10121.2 of the Mississippi Code, Recompiled, which provides a three-year statute of limitations on suits to recover sales taxes.

5. That if the Court should decide the primary issue in favor of the Complainant herein, said Complainant would be entitled to interest on the amount of his recovery at the legal rate from the dates of payment.

6. That if the Court should determine the primary issue involved herein of whether the federal and state excise taxes on gasoline referred to above are legally subject to be included in gross proceeds of sale for the purpose of computing the Complainant's sales tax liability in favor of the inclusion of such taxes, then, in that event, the Defendant and Cross-Complainant shall thereupon be entitled (subject to the reservations hereinafter set forth) to recover from the Complainant and Cross-Defendant the following sums for the respective periods indicated:

a. Additional sales taxes in the amount of $2,299.86, plus such penalties and interest thereon as are provided by law, for the period from February 1, 1969 through August 31, 1970, said additional tax liability being as computed and shown on the Supplemental Additional Sales and Use Tax Return with supporting documents attached hereto as Exhibit "B", consisting of two (2) pages.

b. Additional sales taxes in the amount of $22,241.41, plus such penalties and interest thereon as are provided by law, for the period from September 1, 1970 through August 31, 1971, said additional tax liability being as computed and shown on the Supplemental Additional Sales and Use Tax Return with supporting documents attached hereto as Exhibit "C", consisting of two (2) pages.

7. That the provisions of Paragraph 6 above are expressly subject to the following which constitutes a question which is not stipulated or agreed upon but is left open for decision by the Court under proof and the applicable law:

Whether Complainant's method of selling gasoline at certain locations, being the Bolden Grocery, Broadway Grocery, Thompson Grocery and Riley Grocery, and any other stations similarly operated during the period from

September 1, 1965 through August 31, 1971 constituted retail sales of such products by Complainant taxable for sales tax purposes to him, insofar as amounts paid upon gross sales by Complainant to the store owners is concerned.

8. That the parties hereto have made no stipulation or agreement, in any event, that the Complainant and Cross-Defendant alone bore the burden of the taxes sought to be recovered by him in this proceeding, which question shall be determined by the Court on proof.

9. That the federal excise tax on diesel fuel is levied and imposed on the retail sale of such diesel fuel, and such taxes have, therefore, been excluded by both parties in computing the respective amounts alleged by each of them to be due.

(The exhibits referred to in the stipulation are not included in this Opinion.)

The Court has made a diligent study of all the questions of fact and law before the Court, and is of the opinion that under the applicable statutes the federal excise tax on gasoline levied by Title 26, United States Code, Annotated, Section 4081 (a), et seq. sold by Complainant Gurley was and is properly includable as a part of the gross proceeds of sale.

The Court is further of the opinion that under Mississippi sales tax laws the Mississippi excise tax on gasoline levied by Sections 10013-10, et seq. and by Sections 10076-01, et seq. on gasoline sold by the Complainant Gurley was and is properly includable in gross proceeds of sale.

The Court is further of the opinion that the Complainant Gurley is liable for the payment of sales tax on

the full retail price of the gasoline sold by him through the consignment arrangements with the grocery store owners named in the pleadings.

Therefore, the original and amended bill of complaint in Cause Number 81,953 will be dismissed and the Defendant and Cross-Complainant State Tax Commission recover of Complainant and Cross-Defendant Gurley the amount so stipulated in the stipulation filed among the papers in this cause.

The injunction issued in Cause Number 82,374 is dissolved and said cause dismissed. The decree may be entered in accord with the stipulation made and entered into by the parties and on file among the papers in this cause.

This the 13th day of July, 1972.

/s/ J. C. Stennett
Chancellor

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY MISSISSIPPI

No. 81,853

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Complainant and Cross-Defendant,

v.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Defendant and Cross-Complainant.

Consolidated With No. 82,374

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Complainant,

v.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Defendant.

FINAL DECREE AND JUDGMENT

This cause came on for hearing on the bills of complaint and amended bills of complaint of W. M. Gurley, d/b/a Gurley Oil Company, the answers and cross-bills of Arny Rhoden, Commissioner, Chairman of State Tax Commission for the State of Mississippi, the order consolidating Causes No. 81,953 and No. 82,374 for trial, and other motions and pleadings, and the Court having considered same, together with evidence and briefs offered by Complainant and Defendant, has made findings in an Opinion of the Court filed herein and hereto referred to and made a part

of this Final Decree and Judgment wherein the Court found and now finds that the Complainant, W. M. Gurley, d/b/a Gurley Oil Company, is not entitled to the relief prayed for in its bills of complaint or amendments thereto or to any relief whatsoever;

The Court further found in said Opinion and now finds that under the cross-bill filed herein by the defendant that the defendant is entitled to recover of and from the complainant, W. M. Gurley, d/b/a Gurley Oil Company, the additional sales tax assessments of $24,541.27 plus penalties and interest to July 20, 1972, of $4,589.92, making a total of $29,131.19;

The Court further found in said Opinion and now finds that the injunction issued in Cause No. 82,374 should be dissolved and said cause dismissed at the cost of the complainant, W. M. Gurley, d/b/a Gurley Oil Company;

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court that the assessments and orders of the Mississippi State Tax Commission appealed from be and the same are hereby affirmed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the Complainant, W. M. Gurley, d/b/a Gurley Oil Company, take nothing of, from or against the defendant, Arny Rhoden, Commissioner, Chairman of the State Tax Commission for the State of Mississippi, and that the bills of complaint and amendments thereto be and the same are hereby dismissed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that defendant and cross-complainant, Arny Rhoden, Commissioner, Chairman of State Tax Commission for the State of Mississippi, do have and recover of and from complainant and cross-defendant, W. M. Gurley, d/b/a Gurley Oil Company, the amount of

$29,131.19, together with statutory interest from July 20, 1972, and with all court costs incurred herein taxed against the complainant and cross-defendant, W. M. Gurley, d/b/a Gurley Oil Company, for which and all of which let execution issue;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the injunction issued in Cause No. 82,374 is dissolved and said cause is dismissed at the cost of the complainant, W. M. Gurley, d/b/a Gurley Oil Company, for which and all of which let execution issue.

ORDERED, ADJUDGED AND DECREED on this the 28th day of July, 1972.

/s/ J. C. Stennett
Chancellor

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1734

W. M. GURLEY, D/B/A GURLEY OIL COMPANY,

Petitioner

versus

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,

Respondent

BRIEF FOR THE RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1734

W. M. GURLEY, D/B/A GURLEY
OIL COMPANY,

Petitioner

versus

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,

Respondent

BRIEF FOR THE RESPONDENT

The Respondent, Arny Rhoden, Commissioner, Chairman of the State Tax Commission for the State of Mississippi, respectfully submits that the Petitioner's prayer for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Mississippi entered in this proceeding on January 28, 1974, should be denied.

OPINIONS BELOW

The opinions by the Chancery Court of the First Judicial District of Hinds County, Mississippi, and the Supreme Court of the State of Mississippi, in this matter are adequately set forth by reference in appendices A and B of the Petition submitted herein.

JURISDICTION

The statement of jurisdiction of this matter is adequately set forth in the Petition filed herein.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitution and statutory provisions set forth by Petitioner, additional pertinent statutory provisions are Miss. Code Ann. Section 27-65-13 (1972), Miss. Code Ann. Section 27-65-17 (1972), Miss. Code Ann. Section 27-65-3 (g) (1972), Miss. Code Ann. Section 27-65-29 (e) (1972) and Miss. Code Ann. Section 27-55-11 (1972).

Statutory provisions:

1. Miss. Code Ann. Section 27-65-13 (1972) provides as follows:

> There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

2. Miss. Code Ann. Section 27-65-17 (1972) provides as follows:

> Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed and shall be collected a tax equal to five per cent of the gross proceeds of the retail sales of the business, except as otherwise provided herein . . .

Wholesale sales of beer, motor fuel, soft drinks and syrup shall be taxed at the rate of five per cent in lieu of the one-eighth of one per cent wholesale tax, and the retailer shall file a return and compute the retail tax on retail sales, but may take credit for the amount of the tax paid to the wholesaler on said return covering the subsequent sales of same property, provided adequate invoices and records are maintained to substantiate the credit.

3. Miss. Code Ann. Section 27-65-3 (g) (1972) provides as follows:

Gross proceeds of sales means the value proceeding or accruing from the full sale price of tangible personal property including installation charges, carrying charges, or any other additions to selling price on account of deferred payments by purchaser, without any deductions for freight, cost of property sold, other expenses or losses, or taxes of any kind except those expressly exempt by Miss. Code Ann. Section 27-65-29 (1972).

4. Miss. Code Ann. Section 27-65-29 (1972) provides as follows:

The tax levied by this chapter shall not apply to the following:

(e) Taxes

(1) Federal retailers' excise taxes, federal tax levied on income from transportation, telegraphic dispatches, telephone conversation and electric energy.

(2) The State of Mississippi gasoline tax on gasoline sold by a distributor for nonhighway use

which is refunded by the Motor Vehicle Comptroller.

5. Miss. Code Ann. Section 27-55-11 (1972) provides as follows:

> Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to eight cents per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose.
>
> With respect to distributors or other persons who bring, ship, have transported, or have brought into this state gasoline by means other than through a common carrier, the tax accrues and the tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when and at the point where such gasoline is brought into the state.

QUESTIONS PRESENTED

1. Whether Excise Taxes imposed by 26 U. S. C. Section 4081 and Miss. Code Ann. Section 27-55-11 (1972) may be included in the sales tax base utilized by the State of Mississippi in computing taxable "gross proceeds of sales"?

2. Respondent would accept question No. 2 posed by Petitioner.

3. Respondent would accept question No. 3 posed by Petitioner.

STATEMENT OF THE CASE

Petitioner Gurley is in the business of importing, distributing and retailing gasoline, diesel fuel and related petroleum products, with principal offices in West Memphis, Arkansas, ownership of five retail service stations in Mississippi, and consignment sales operations through several Mississippi grocery stores. Petitioner obtained Mississippi Distributor's Permit No. 447 for gasoline, diesel fuel, kerosene or oil, and posted the necessary bond conditioned upon the full payment of all excise taxes levied on those fuels pursuant to Chapter 64, Mississippi Laws of 1946, as amended. Petitioner is likewise qualified as a distributor of gasoline with, and pays federal excise tax to, the Internal Revenue Service. During the period pertaining to this Petition, and pursuant to the authority of the permits and bonds described, Petitioner purchased gasoline and fuel from producers in Arkansas and Tennessee and distributed that fuel for sale at Mississippi outlets.

On January 16, 1971, Petitioner filed suit to recover sales taxes in the amount of Sixty Two Thousand Seven Hundred Eighty Two Dollars and Fifty Seven Cents ($62,782.57) which he alleged were improperly collected by the State of Mississippi. The basis of Petitioner's complaint was that the sales taxes were computed on a tax base which included State and Federal Excise taxes in addition to the base price of gasoline. Respondent herein cross-complained for sales taxes not paid by Petitioner and the Respondent prevailed in both the Mississippi lower Court and the Mississippi Supreme Court. In the subject proceeding, Petitioner has requested the United States Supreme Court to grant certiorari to consider constitutional questions which he has raised and to reverse the decision of the Mississippi Supreme Court.

ARGUMENT

POINT 1

UNITED STATES AND MISSISSIPPI EXCISE TAXES ARE BY DEFINITION AND STATUTE IMPOSED ON THE DISTRIBUTOR NOT THE CONSUMER.

Courts have used many various definitions for the meaning of the word excise, as an adjective to describe a tax. It is submitted that by most such definitions excise taxes such as the ones in question are legally imposed upon the seller or distributor. The following quoted definitions from two earlier Federal decisions, among others, so indicate:

> "An impost for a license to pursue certain callings or to deal in special commodities or to exercise particular franchises." *East Ohio Gas Company v. Tax Commission of Ohio*, 43 F. 2d 170, 172 (DC Ohio 1930).

> "The terms excise tax and privilege tax are synonymous." *American Airways, Inc. v. Wallace*, 57 F. 2d 877, 880 (DC Tennessee 1932).

The Federal Gasoline Excise Tax is found in Title 26, Chapter 32, *United States Code*, Section 4081 et seq. entitled "Manufacturers Excise Taxes". Section 4081(a) provides as follows:

> "There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ a gallon."

A "producer" for the purposes of the Federal Excise Tax is expressly defined in Title 26, *U. S. Code*, Section 4082(a) as follows:

> "Producer. As used in this subpart, the term

'producer' includes a refiner, compounder, blender or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer. Any person to whom gasoline is sold tax-free under this subpart shall be considered the producer of such gasoline."

A cursory examination of the federal statute discloses that no reference is made therein to the ultimate retail purchaser or consumer of the product taxed. The levy attaches upon the sale by the producer, manufacturer or importer of the gasoline, and not upon its sale to the ultimate consumer.

In this case it is unnecessary and inappropriate to resort to any extraneous guidelines for the interpretation of the statute for the language of the statute is clear and unambiguous in its terms.

With respect to the Federal Excise Tax, the question of legislative intent was discussed at length by the Illinois Supreme Court in *Martin Oil Service, Inc. v. Illinois Department of Revenue*, 49 Ill. 2d 260, 273 NE 2d 823, Cert. denied 405 US 923 (1971):

"It is urged by Martin that certain congressional references to the gasoline tax show it must be considered a tax whose incidence rests on the consumer. Exemplary of these is the President's Message to Congress May 17, 1965, Report of the House Ways and Means Committee on H. B. 8371 89th Congress First Session (1965) at 1070-71, in which President Johnson said: 'reform of the excise tax structure will lease * * * excises on alcoholic beverages, tobacco, gasoline, tires, trucks, air transportation (and a few other user charges and special excises) * * *.' (H. R. Doc. No. 173, 89th Cong., 1st Sess. 3 (1965).) We

> consider the references to the tax as a 'user tax' were not intended to be descriptive of the legal incidence of the gasoline tax. It is not disputed that the ultimate economic burden of the tax rests upon the purchaser-consumer. A practical nontechnical description of the tax as a 'user tax' is explainable, consistently with the legal incidence of the tax being on the producer. The economic burden of the tax has no relevance to the issue before us. *Fischman & Sons, Inc. v. Department of Revenue*, 12 Ill, 2d 253.
>
> So far as the Federal legislative intendment is concerned it is relevant to notice that a reference of greater and persuasive significance to the incidence of the tax is found in Senate Report No. 367, a report of the Committee of Finance relative to the Federal-Aid Highway Act of 1961. (U. S. Code Congressional and Administrative News. vol. 2, 87th Congress, 1st Session, 1961.) The report, which contains a recommendation by the committee that the gasoline tax be continued at the rate of four cents per gallon, states: 'Under present law the Federal tax on gasoline is imposed on the producer, importer or wholesaler distributor of the gasoline and is payable shortly after he makes its sale.' "

With respect to the Mississippi gasoline excise statute, it is apparent that its language makes it a tax upon the producer (distributor) and not a tax upon the consumer.

Section 27-55-11 of the *Mississippi Code of 1972* reads as follows:

> Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to eight cents per

> gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose. . .
>
> With respect to distributors or other persons who bring, ship, have transported, or have brought into this state gasoline by means other than through a common carrier, the tax accrues and the tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when and at the point where such gasoline is brought into the state.

Many cases holding that such excise taxes are not includable in the price base for state sales taxes are based upon the fact that some state statutes expressly provide for the tax to be passed along to the ultimate user of the fuel. Obviously, no such provision exist in the Mississippi law and while the distributor on whom the incidences of the tax rests, may pass on the tax when he sells the gasoline, he is certainly not legally required to do so. In fact, as shown by the testimony in the trial court in this cause of Joe Sharp, the State Official charged with the duty of administering and collecting these taxes, tax liability attaches to the distributor or importer at the time the gasoline enters the State of Mississippi. It is immaterial to Mississippi whether, after paying the tax, the distributor sells the gasoline, gives it away, pours it on the ground, or sells it to a retailer or directly to an ultimate consumer. (Tr. Rec. pp. 177-180, 187).

In fact, on January 1, 1970, an amendment became effective by which the provision in the Mississippi statute that had theretofore permitted a gasoline distributor to

pass along the tax when he sold the gasoline was removed from the law.

POINT 2

THE LEGAL INCIDENCE OF THE GASOLINE EXCISE TAXES IMPOSED BY 26 U. S. C. SECTION 4081 AND MISS. CODE ANN. SECTION 27-55-11 (1972) HAS BEEN CONSTRUED BY FEDERAL AND STATE COURTS TO FALL ON THE DISTRIBUTOR.

Several jurisdictions have considered the question and have determined the legal incidence of the federal gasoline excise tax. Pennsylvania in *Tax Review Board vs. Esso Standard Division of Humble Oil & Refining Company*, 424 Pa. 335, 227 A.2d 657, cited *Panhandle Oil Co. vs. State of Mississippi ex rel. knox*, 277 U.S. 218 48 S.Ct. 451, 72 L. Ed. 857 (1928) and *Indian Motorcycle Company vs. United States*, 283 U.S. 570, 51 S. Ct. 601, 15 L. Ed. 1277 (1931) and found that the legal incidence of the tax was on the purchaser-consumer. Despite the Pennsylvania Court's reading of those cases, in view of the case of *Alabama vs. King and Boozer*, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 1 (1941), later federal decisions have read the *Pan handle* and *Indian Motorcycle* cases differently, as is indicated by the following language:

> [with reference to the *Indian Motorcycle* case] . . . The Court did not, of course, decide that the purchaser was the tax payer. It only made a liberal application of the doctrine of federal immunity from State tax. And in *Alabama vs. King and Boozer* (citations omitted), the Supreme Court overruled *Panhandle*, the precedent upon which the *Indian Motorcycle* decision was based, and held that, even in the application of the immunity of the Federal Government from State

> taxation, the "incidence" of the tax and not the place where the economic burden of the tax ultimately rested was the important thing. (P. 749) *Dow Jones & Company vs. United States*, 128 F. Supp. 748 (1955).

In the case of *Martin's Auto Trimming, Inc. vs. Riddell*, 283 F.2d 503 (1960), where the Plaintiff was seeking to obtain a return of manufacturing taxes which were later passed on to consumers, the Court said:

> Appellants main reliance is placed on *Indian Motorcycle Company v. United States*, 283 U.S. 570, 51 S. Ct. 601, 15 L. Ed. 1277 (1931), Standard Oil v. United States, 130 F. Supp. 821 . . . .
>
> It is obvious the Appellant has misread the effect of the decisions in these cases. None of these cases hold that the excise tax is imposed upon the purchaser. All of those cases hold that the tax is the obligation of the manufacturer when the product is sold. The excise tax in question on this appeal is the tax which was imposed upon sales by Appellant during the period mentioned. (P. 505)

A majority of the jurisdictions considering the question have concluded that legal incidence of the excise tax is on the distributor and therefore, includable in the base for sales tax. *Sun Oil Company v. Gross Income Tax Division*, 238 Ind. 111, 149 N.E. 2d 115 (Ind. S. Ct.): *State of Georgia v. Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E. 2d 224, affirmed by the Georgia Appellant Court in 226 Ga. 883, 178 S.E. 2d 173, and *Martin Oil Service, Inc. v. Department of Revenue*, 49 Ill. 2d 260, 273 N.E. 2d 823 (Ill. S. Ct., Sept. 30, 1971) Cert. denied by United States Supreme Court in Docket No.

71-845, February 22, 1972. *Pure Oil Company v. State of Alabama*, 244 Ala. 258, 12 So. 2d 861, 148 ALR 260.

The cases of *Standard Oil Company v. State Tax Commissioner of North Dakota*, 71 N.D. 176, 299 N.W. 447, 135 ALR 1481, and *Standard Oil v. State of Michigan*, 283 Mich. 85, 276 N.W. 908, did not consider or determine the question of the legal incidence of the federal tax. These cases were decided on the rationale that because liability for the federal tax accrued only upon sale *by* a producer, and because under the Michigan and North Dakota sales tax acts, the sales tax liability likewise accrued at the time of that sale, the federal tax could not be included as part of the sales tax base in those states.

We believe the latest, soundest, and most complete decision on the precise issues presented here is that of *Martin Oil Service, Inc. v. Illinois Department of Revenue*, Supra, decided by the Illinois Supreme Court on September 30, 1971, and on which certiorari was denied by the United States Supreme Court on February 22, 1972. 405 U.S. 923, 30 L.Ed. 2d 794, 92 S. Ct. 691, 49 Ill. 2d 260, 273 N.E. 2d 823. There, Martin operated two wholesale and 43 retail gasoline outlets in Illinois. He was licensed by the United States for payment of the federal excise tax, just as Gurley is licensed for that purpose in this case. He contended that the federal gasoline tax should not be included in gross receipts for the purpose of computing the Illinois Retailers Occupation Tax, which corresponds to Mississippi's sales tax, alleging that the legal incidence of the federal tax was on the consumer-purchaser. In disposing of this contention, the Illinois Supreme Court very cogently stated as follows:

"This question appeared before this Court in

1936, when in *People v. Werner*, 364 Ill. 594, it was said that the legal incidence of the Federal gasoline tax rested on the producer. Martin, to avoid the force of *Werner*, argues that the legal incidence of the tax was there stipulated by the parties. It is true that *Werner* was decided on a stipulation of facts. We cannot find however, any suggestion that the question of the legal incidence of the tax was part of the stipulation. Rather it seems clear that this Court's expression that the legal incidence of the tax rests on the producer was based on its analysis of the Federal statute.

As Martin points out at least one jurisdiction has taken a position opposed to *Werner*. The Supreme Court of Pennsylvania in *Tax Review Board vs. Esso Standard Division of Humble Oil and Refining Co.*, 424 Pa. 335, 227 A. 2d 657, cert. denied, 389 U.S. 824, 19 L.Ed. 79 held that the legal incidence of the tax is on the purchaser-consumer. Decisions of two other States are read by Martin as supporting its thesis that the tax incidence is on the purchaser-consumer. It was held in *Standard Oil vs. State* (1937), 283 Mich. 85, 276 N. W. 908, and *Standard Oil Co. vs. State Tax Commissioner* (1941), 71 N. D. 146, 299 N. W. 447, that on sales from producer retailers to consumers the Federal gasoline and State sales taxes were taxes that were to be simultaneously imposed. Those Courts concluded from this that the Federal tax should not be included in the "gross receipts" for the purpose of computing the State tax. Neither case considered the question of on whom the legal incidence of the Federal tax falls. We would observe that other Courts have reached the same conclusion this Court did in *Werner*. It was held in *Sun Oil Co. v. Gross Income Tax Division*, 238 Ind. 111, 149 N. E. 2d 115, by the Supreme Court of Indiana and in *State vs. Thoni Oil Magic Benzol Gas Stations*,

> *Inc.*, 121 Ga. App. 454, 174 S. E. 2d 224, aff'd 226 Ga. 883, 178 S. E. 2d 173, by the appellate court of Georgia that the legal incidence of the Federal tax rests upon the producer. The Supreme Court of Indiana relied importantly on *People vs. Werner*, in its determination. We consider after reviewing these cases that *Werner* correctly judged that the incidence rests on the producer. The validity of this view can be illustrated by the consideration that if the tax is not paid by the producer, he is the only one from whom the government may seek to collect the tax. Significantly the statute does not impose any liability on the purchaser-consumer if the gasoline tax is not remitted by the producer. It is irreconcilable to say that the legal incidence of the tax is on the consumer-purchaser and to say that he is not liable for the tax. Referring to our decision in *American Oil Co. vs. Mahin*, No. 43376, where we held that the incidence of the Illinois Motor Fuel Tax is on the consumer, we note that the statute there examined provides that the tax may be recovered from the consumer-purchaser if it has not been collected by the retailer.

Martin then contended as does Gurley in the instant case that because certain consumers of gasoline can secure refunds or credit for gasoline tax paid, the incidence of the tax was upon the consumer-purchaser rather than upon the producer-distributor. The Illinois Court disposed of this contention as follows:

> Another contention of Martin is that because amendments to the gasoline statute provide that certain consumers of gasoline can secure refunds of the gasoline tax paid, it must have been the legislative intent that the consumer-purchaser would bear the legal incidence of the tax. It is pointed out that in *Chicago Motor Club vs. Kinney*

329 Ill. 120, the Court said that a tax refund to a person who has not directly or indirectly paid the tax would be unconstitutional, and thus, Martin argues, as certain consumers can secure a refund, the incidence of the tax must be on the consumer-purchaser.

We consider that the argument has only superficial validity when measured against the very convincing evidence of a contrary legislative intention, including the statement of the Committee on Finance that the Federal gasoline tax was imposed "on the producer, importer, or wholesale distributor of the gasoline". The amendments upon which Martin relies provide that the purchaser-consumer can obtain payment in full of the Federal gasoline tax, that is, four cents per gallon, if the gasoline has been used on a farm for farming purposes (26 U. S. C. Sec. 6420 (a)) and half of the tax payment, that is, two cents a gallon, if the gasoline has been used for other non-highway purposes (26 U. S. C. Sec. 6421 (a)) or by the local transit systems (26 U. S. C. Sec. 6421 (b)).

We consider that these payments by the Federal government are not refunds in a technical sense but rather allowances to certain consumer-purchasers based on a recognition that the economic burden of the gasoline tax falls on the ultimate consumer. The gasoline tax proceeds are used to provide Federal finances for highway support.

Petitioner's argument in the instant case adopted Martin's second major contention in toto to the effect that if the legal incidence of the tax should be on the producer rather than the consumer, sales made to consumers by one who is a producer-retailer, as is petitioner and as was Martin, should be distinguished from sales made by one who is simply a retailer, and sales by the producer-retailer should be exempt from sales tax. Martin

cited *Standard Oil vs. State*, Supra, and *Standard Oil Company vs. State Tax Commissioner*, Supra, as does petitioner. The Illinois Court disposed of this contention with the following reasoning which we believe valid and sound:

> In *Standard Oil Co. vs. State*, 283 Mich. 85, 276 N. W. 908 and *Standard Oil Co. vs. State Tax Commissioner*, 71 N. D. 146, 299 N. W. 447, Michigan and North Dakota adopted the position Martin would have us take. As expressed by the Supreme Court of Michigan the rationale of this position is that since the two taxes attach simultaneously, the Federal gasoline tax should not be considered a part of the sales price but as a fund which is payable by the producer to the Federal government.
>
> The Department's response is that if Martin's argument is accepted it would result in the Federal tax of four cents per gallon being included in the computation of the Illinois tax on sales by retailers who are not also producers and excluded in the case of producer-retailers. This would typically result in the cost of gasoline to a consumer who purchases from a non-producer retailer being greater than to one who purchases from a producer-retailer and would economically discriminate against non-producer retailers. It would violate, argues the Department, the Illinois constitution and the equal protection clause of the United States constitution.
>
> The retailers' occupation tax in Illinois is imposed on a retailer's "gross receipts" (Ill. Rev. Stat. 1969, Ch. 120, Par. 441). "Gross Receipts" are the "total selling price" or the "amount of such sales". (Ill. Rev. Stat. 1969, Ch. 120, Par. 440) "Selling price" or "amount of sale" is defined as the

"consideration for a sale". (Ill. Rev. Stat. 1969, Ch. 120, Par. 440).

The question therefore is whether when the producer-retailer passes on the cost to him of the Federal gasoline tax in the form of a higher price to the consumer, the amount by which the price is thus raised to compensate the producer-retailer can be said to be part of the consideration he receives upon the sale of the gasoline.

. . . The legal incidence of the Federal gasoline tax is on the producer, who is under no legal duty to pass the burden of the tax on to the consumer. If he does pass on the burden of the tax it is simply done by charging the consumer a higher price. This higher price is the result of the added cost, because of the burden of the Federal tax, to the producer in selling his gasoline. It is not different from other costs he incurs in bringing his product to market, including the costs of raw material, its processing and its delivery. All these costs are includable in his "gross receipts," or the "consideration" he receives for his gasoline.

No reason has been given by Martin why the cost of the gasoline tax should be regarded differently from the other costs of the producer-retailer and we perceive none.

In the very recent case of *Jerry M. Ferrara vs. Director, Division of Taxation*, Volume 2, Commerce Clearing House, Inc., New Jersey State Tax Reports, New Matters, Paragraphs 200-583, Division of Tax Appeals, March 8, 1973, it was held:

N. J. S. A. 54:11B-3 (known as the Unincorporated Business Act.) imposes a tax on

every individual or other unincorporated en-

> tity engaged in an unincorporated business an annual excise tax, measured by the gross receipts of such unincorporated business and allocated to the State as hereinafter provided at the rate of ¼ of 1%. . . .

The issue presented is whether the New Jersey Motor Fuels Tax of $0.06 per gallon and the Federal Excise Tax of $0.04 per gallon (as set forth in paragraphs 4 and 5 respectively of the aforesaid stipulation) should be included in the gross receipts of the retail gasoline dealer for the purpose of calculating taxes due under the N. J. Unincorporated Business Tax, N. J. S. A. 54:11B-1, et seq.

N. J. S. A. 54:11B-2(b) defines gross receipts to mean and include all receipts, of whatever kind and in whatever form, derived by an unincorporated business, without any deduction therefrom on account of any item of cost, expense, or loss, except that gross receipts shall not include the sales price of property returned by customers to the extent that the sales price thereof is refunded either in cash or in credit.

The Federal Gasoline Excise Tax levied by 26 U. S. C. A. Section 4081 of the Internal Revenue Code of 1954 (which was in effect during the year 1967) provides, in material part, as follows:

> There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ per gallon.

The New Jersey Motor Fuels Tax, N. J. S. A. 54:39-27, states in part:

> Every distributor shall . . . render a report to the commissioner stating the number of

> gallons of fuel sold or used in this State by him. . . . A tax of $0.06 per gallon on each gallon so reported shall be paid by each distributor. . . . If any distributor shall fail, neglect or refuse to file within the time prescribed by this section, the commissioner shall note such failure, neglect or refusal on his records, and shall estimate the sales distribution and use of said distributor, assessing the tax thereon, adding to said tax a penalty of 20% thereof for failure, neglect or refusal to report, and such estimate shall be prima facie evidence of the true amount of tax due to the commissioner for such distributor. . . .

The petitioner contends that for the State to include as "gross receipts" the State and Federal Excise tax is arbitrary, oppressive and illegal. The issue is further narrowed to the determination of upon whom the legislature and congress imposed the respective taxes. If the aforesaid excise taxes are imposed upon the consumer, and the retailer and distributor is merely a "collector" for the respective governments involved, then the excise taxes collected should not be included in the gross receipts.

However, if the taxes are imposed on the retailer or distributor, then the entire price paid by the ultimate consumer, including all excise taxes paid, should be included in the petitioner's "gross receipts."

Section 4081 of the Federal Excise Tax, Supra, provides that the tax is "imposed on gasoline sold on the *producer or importer* thereof" (Emphasis added).

Section 4082 defines a producer to include re-

finers, compounders, blenders and wholesale distributors.

The Federal statute clearly and unambiguously imposes the tax on the producer (which includes distributor) of the gasoline and not on the ultimate consumer. Liability for the payment of the tax rests solely upon the producer and nowhere is there any provision for any liability upon the ultimate consumer for the producer's failure to pay the tax.

The fact that the amount of the tax is added to the selling price and ultimately paid for the final purchaser does not constitute the latter as the taxpayer.

All taxes in effect are paid for by the ultimate consumer, but this does not mean that the consumer is personally liable for the tax or is the taxpayer.

All producers, manufacturers, distributors, and retailers are subjected to taxes of one form or another, including real estate and personal property taxes, which are calculated in their costs and added to the purchase price and "passed on" to the ultimate consumer. However, the words "passed on" are technically inaccurate in that the legal incidence of the aforesaid taxes are not on the consumer and he is not personally liable for the payment of said taxes.

In *Lash's Products Co. vs. United States*, 287 U. S. 175, 49 S.Ct. 100, the Court said:

> The phrase "passed the tax on" is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. . . . The purchaser does not pay the tax. He pays or

may pay the seller more for the goods because of the seller's obligation, but that is all.

Petitioner, in addition, claims that since the excise taxes on gasoline amounted to approximately 40% of the wholesale cost of the product itself, the respondent cannot seriously contend that the retail dealer absorbs the taxes as a cost of doing business.

Petitioner also complains that the State is in effect attempting to levy a tax upon a tax, which is grossly unfair to the retailer, and also it is contrary to Federal Law. Petitioner may be correct in this contention, however, this Division cannot pass upon the fairness of any tax laws passed. In this respect, Petitioner's remedy lies with the New Jersey Legislature.

As to petitioner's contention that the tax is unlawful, it is well settled that this Division does not have the power to declare a statute unconstitutional.

Accordingly, it is the conclusion of this Division that the Federal Excise tax should be included in the gross receipts of the Petitioner.

The next question to be decided is whether the New Jersey Motor Fuels tax is paid by the distributor or by the ultimate user.

N. J. S. A. 54:39-27, Supra, clearly sets forth that the tax shall be reported and paid by each distributor and nowhere therein does it appear that there is any liability whatsoever upon the consumer.

The reasoning heretofore set forth in relation to the Federal Excise tax applies equally as well to

> the New Jersey Fuels tax and, therefore, I conclude that the New Jersey Motor Fuels tax is also imposed upon the retailer for the purpose of calculating taxes due under the New Jersey Unincorporated Business Tax.
>
> Judgment will be entered accordingly.

We respectfully submit that the majority rule to the effect that the incidence of the federal tax is upon the producer-distributor and not upon the retailer-consumer is accurate and that therefore the same is properly included within gross proceeds of sale for purposes of determining Mississippi sales tax liability. We further submit that this is true regardless of whether the person paying the federal tax is simply a producer under the federal definition or whether he is a producer-retailer such as Gurley.

Petitioner in his brief contends that the Mississippi excise tax on gasoline is a tax upon the consumer and not upon the seller and bases this argument on the case of *Panhandle Oil Co. vs. Miss. ex rel, Knox*, 277 U.S. 218 (1928) and dicta in the case of *State v. Republic Oil Co.*, 32 So. 2d 290 (1947). We submit that the *Panhandle* case has been overruled by the United States Supreme Court in the case of *State of Alabama vs. King and Boozer*, 314 U.S. 1, 86 L. Ed. 1, 62 S. Ct. 43, in which the Court held that, contrary to the result reached in *Panhandle*, a tax, the economic burden of which falls on the federal government, may constitutionally be imposed by a state.

We will review the Mississippi cases dealing with the gasoline tax act. The first case decided by the Mississippi Supreme Court and a case heavily relied upon to support the petitioner's position is the case of *State ex rel, Knox*

vs. Panhandle Oil Company (1927), 147 Miss. 663, 112 So. 584, 277 U.S. 218, 72 L. Ed. 218, 48 S. Ct. 451.

The applicable gasoline tax act at that time was Section 2, Chapter 115 of the Laws of 1924, as follows:

> *Privilege Tax on Gasoline:* Section 2
>
> Any person engaged in the business of distributor of gasoline, or retail dealer of gasoline, shall pay for the privilege of engaging in such business, an excise tax of three cents (3¢) per gallon *upon the sale of gasoline by SUCH dealer in this state* (italics supplied). . . .

The Mississippi Court in construing this act said:

> It will be observed that the statute fixing the tax on the sale of gasoline, taxes the dealer for the privilege of engaging in the business of selling gasoline. It is, therefore, a privilege tax against the dealer for the right to carry on the business and is not a property tax; but the gallonage sold by the dealer is merely the measure of the tax to be charged the dealer for the privilege of carrying on the business of selling gasoline. . . .

The Supreme Court of Mississippi said:

> . . . the tax is not attempted to be imposed on the gasoline while in the hands of the government, but it is charged against the dealer on each gallon of gasoline sold before the government purchases the gasoline; consequently, it is not a tax on the property or instrumentality of the government.

The Court went on to say as follows:

> The Supreme Court of the United States has held

> that the states are within their rights in taxing the privilege of carrying on businesses, and that the Federal Government is not entitled to have such tax annulled upon its purchases with which to operate its instrumentalities. *Metcalf vs. Mitchell*, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384; *Fidelity and Deposit Co. vs. Commonwealth of Pennsylvania*, 240 U. S. 319, 36 S. Ct. 298, 60 L. Ed. 664.
>
> That the tax here in question is a privilege tax on the dealer and not a tax on the thing sold or a tax on the person who buys the commodity, was clearly decided by the Court in *Barataria Canning Co. vs. State*, 101 Miss. 890, 58 So. 769. In that case the Court held that the tax was not imposed on the thing sold, but was a tax to be paid by the person engaged in the business of packing or canning oysters in this state, or upon the local dealer selling or shipping the oysters, and that the tax was imposed as a privilege tax for conducting the business in this state, and that the amount of the tax was measured and fixed by the number of barrels of oysters sold by the dealer. We think the case is in point, and is decisive of the case at bar.

The case was appealed to the Supreme Court of the United States and was reversed by a split (4-3) decision, the majority opinion stating as follows:

> To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale.

In effect, the *Panhandle* case went off on the theory of measurement in fixing the incidence of the tax. However, in the dissenting opinion, Mr. Justice Holmes said:

> *If the Plaintiff in error had paid the tax and had*

> *added it to the price, the government would have had nothing to say.*

Shortly after the decision was handed down on May 14, 1928, the Mississippi Legislature amended the act, House Bill 472, Section 3, Regular Legislative Session of 1928, to impose the tax on distributors, etc., *when the product was received in the state for storage*, which has been THE language followed throughout the amendments to the act.

The Mississippi Supreme Court in construing the act in 1932 in the case of *City of Jackson vs. State ex rel. Mitchell, Atty. Gen.*, 156 Miss. 306, 126 So. 2 (1930), held that the tax is a privilege tax imposed upon the distributor or wholesaler-dealer.

The petitioner in this case relies heavily on the construction placed on the Gasoline Tax Act in the case of *State ex rel. Rice vs. Republic Oil Refining Co.*, 202 Miss. 688, 32 So. 2d 290 (1947). The question and point of law at bar was not before the Court in that case, and the language therein was pure dicta. The question before the Court in Republic, Supra, was whether the distributor was to be charged on the basis of invoices or the actual amount received within the state. The Court stated the question in the following language.

> The 677-062 gallons, the basis of this suit, were never received in Appellee's storage tanks and were not sold, distributed, used on the highways or in internal combustion engines, or for any other purpose, in Mississippi, and Appellee neither reported nor paid taxes thereon.

By way of dicta on page 293, the Court used the following language:

> The six cents a gallon tax is not upon Appellee or other distributors either at wholesale or retail, but is upon the ultimate consumer; is a use tax for the use of the public highways by the consumer and is not to be collected for uses other than upon the public highways. The retail dealer in selling to the consumer adds the six cents to that which would otherwise be the price of the gasoline provided the gasoline is to be used on the public highways, and the retailer remits the six cents to the State, which, in turn, reimburses the wholesaler, such as Appellee, who has already paid the tax in advance to the State.

Republic, Supra, is by no means controlling, since the language used was pure dictum and has never been recognized either by the State of Mississippi or the United States Government as construing the act insofar as the incidence of the tax is concerned.

In *City of Jackson vs. Wallace*, 196 So. 223 (1940), 189 Miss. 252, the Court said:

> Language beyond the litigation in which it is used is limited to the facts involved in the litigation, and all beyond that, necessary or proper for the construction of the particular subject matter before the Court, is mere "dictum" and not "decision".

In 1933, the Mississippi Supreme Court in the case of *Treas vs. Price*, 167 Miss. 121, 146 So. 630 (1933), said:

> One who sells or distributes, within the statute's definition thereof, gasoline to others is liable to

> the tax therefor without reference *to the use to which the purchaser or distributor puts the gasoline.* (italics supplied)

We next turn to the exact language of the Section of the statute under consideration, Section 10013-06, of the Mississippi Code of 1942. This statute was repealed effective January 1, 1970, and was replaced by Miss. Code Ann. Section 27-55-11 from and after that date. The original statute, which applied to the greater portion of the period in dispute here, reads in pertinent portions as follows:

> Any person engaged in the business as a distributor, or who acts as a distributor as defined in this act, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to and computed as follows:
>
> (a) Seven cents (7¢) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended or compounded in this state, or received in this state for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose. . . .

The incidence of the tax is further fixed in said act in the following language:

> The basis for determining the tax liability shall be the correct invoiced gallons, adjusted to 60 degrees F., at the refinery or point of origin of shipment.

The most recent decision dealing with the precise question involved here relative to the incidence of the Mississippi gasoline tax is *U. S. vs. Sharp, Motor Vehicle Comptroller*, 302 F. Supp. 668 (1969), which was a decision of

a three-judge constitutional court. In that case, the United States sought an adjudication of the three-judge court that the Mississippi Privilege Tax imposed on gasoline distributors was a tax upon the consumer of such gasoline and that, therefore, since the tax had been paid on gasoline purchased by the government, it was entitled to refund under its immunity from state taxation. Likewise involved was a charge of discriminatory application of exemptions of governmental entities from payment of the gasoline tax which is not pertinent here. Judge Dan Russell speaking for the panel disposed of this contention in the following language:

> . . .We do not quarrel with the contention that a statute's practical operation and effect determines where the legal incidence of the tax falls. We simply agree that the tax burden in the Mississippi statute falls plainly and squarely on the distributor, to whom the state looks for the payment of the tax, albeit the amount of the tax may ultimately be borne by the vendee, in this case the federal government. . .
>
> . . .Hence we find that Mississippi's gasoline tax is not such a tax to afford immunity to the plaintiff, except when it has received specific exemptions such as for gasoline used by the armed forces of the United States. As stipulated, this exemption has been in effect throughout the period of this claim and is now in effect by Section 10013-39 of the Mississippi statutes.
>
> In sum, the Court finds as a fact that the tax in suit at all times was levied and assessed against and collected by the State of Mississippi from a gasoline distributor, duly qualified under its laws, and never collected any such tax in suit (directly or indirectly) from the United States or

> any of its agencies; and that the defendant never discriminated against the Plaintiff in any manner in its administration of said privilege or excise tax law, according to the undisputed evidence and testimony in this case.

In *State of Louisiana vs. Atlas Pipeline Corporation*, 33 F. Supp. 160 (1940), the state tax collector was seeking to enforce a specific lien against a corporate debtor in bankruptcy, for Louisiana excise taxes which the corporation had allegedly collected from its customers, but had failed to pay to the state. Although the Court found there was no provision which would enable the state to effect a superior lien against the corporate assets, in construing a statute very similar to the one in issue here, the Court grounded its finding of duty to pay the tax on the state's right of recourse against the corporation, saying:

> . . .nowhere do I find any provision for a lien of any sort. On the contrary, the requirements, such as the giving of bond, making reports and penal provisions, were intended to prevent the loss of the tax through the obviously easy means of disposing of it or consuming the gasoline. The dealer is liable for the tax whether he collects an amount sufficient to cover it from those to whom he sells or not.

Petitioner relies upon decisions of other courts in his brief which hold that under their particular sales tax acts and under the express provisions of their respective gasoline tax laws, the state gasoline tax may not be included within gross proceed of sales for sales tax purposes. Each of these states and authorities cited turn upon the fact that the particular acts involved expressly require that the gasoline tax be passed on to the ultimate consumer. For example, in *State of Georgia vs. Thoni Oil*

Magic Benzol Gas Stations, Inc., Supra, the applicable provision of the Georgia law was as follows:

> It is the intention of the General Assembly that the consumer of motor fuel bear the burden of the taxes imposed by this chapter. No person who sells motor fuel in this state shall absorb the taxes imposed by this chapter on the motor fuel sold.

It is further provided that every person who sells at wholesale or at retail must state separately the amount of the tax from the price of the fuel in all advertising signs, price display signs, etc., and that the taxes are "added to the sales price."

See also the recent case of *Jerry M. Ferrara vs. Director, Division of Taxation* cited above as to the inclusion of the state gasoline excise tax as a part of the gross proceeds of sales in determining sales tax liability.

It is undisputed that mere economic incidence is not determinative of the question of legal incidence. In *Tax Review Board vs. Esso Standard Division*, 424 Pa. 355, 277 A.2d 657, cert. denied, 389 U. S. 824, 88 S. Ct. 63, 19 L. Ed. 2d 79 1968), cited by petitioner, the Court said as follows:

> We agree that if the tax involved is truly a manufacturer's or producer's tax, the city's position is correct. We further agree that the mere fact that tax is passed on to the purchaser does not determine upon whom the tax is imposed. The economic burden of all taxes incident to the sale of merchandise is traditionally so passed on as part of the "overhead."

See also, *Lash's Products Co. vs. United States*, supra.

We therefore submit that the position of petitioner is not well taken and that there is no constitutional or legal bar to inclusion of Mississippi's excise tax on gasoline within gross proceeds of sale and collecting sales tax thereon. We further submit that the fact that petitioner has qualified as a distributor under the Mississippi act and pays the taxes pursuant to such qualification and is also a retailer of gasoline is immaterial. To allow Gurley, because he is both a distributor and retailer, to deduct state gasoline tax before computing his sales tax liability and to deny the right of such deduction to other distributors because they are not retailers of gasoline would be arbitrary and discriminatory and certainly would be inconsistent with the provisions of the Mississippi statute.

We therefore respectfully submit in view of the foregoing authorities and fallacies in the argument of petitioner that the incidence of the Mississippi gasoline tax is upon the distributor and not upon the consumer, and that the same is property includable in gross proceeds of sale for purposes of determining Mississippi sales tax liability.

POINT 3

STATE COURT DETERMINATIONS OF THE OPERATING INCIDENCE OF THEIR TAXING SCHEMES HAVE BEEN ACCEPTED AS CONTROLLING BY FEDERAL COURTS.

There is no doubt that the Mississippi Supreme Court has determined the operating incidences of the Federal and State gasoline excise taxes to fall on the producer distributor; the Court so decided in the decision under attack here. Respondent respectfully submits that except where the issue of Federal immunity from taxation is raised,

there is equally little doubt that Federal Courts are bound by State Court determinations of the operating incidence of taxing schemes. Questions of construction of state statutes have always been within the province of State Supreme Courts, as is evidenced by the language of this Court in *Alabama vs. King and Boozer*, Supra, as follows:

> The taxing statute, as the Alabama Courts have held, makes the "purchaser", liable for the tax to the seller who is required "to add to the sales price" the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or credit. Who, in any particular transaction like the present, is a "purchaser" within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. (pp. 9-10)

In addition, the decision of the Supreme Court of the United States in the case of *Federal Land Bank of St. Paul vs. Bismarck Lumber Company*, 314 U. S. 95, 62 S. Ct. 1, 86 L. Ed. 65, is direct authority for the proposition that the determination of the highest Court of the state is controlling upon the question as to whether the legal incidence of a tax imposed by a law of that state is upon the vendor or the vendee. See also *United States vs. Sharp*, 302 F. Supp. 668 (S. D. Miss. 1969).

It is only when the question of federal immunity is raised that federal Courts may examine the taxing schemes to determine the operating incidence of the tax, as is evidenced by the following language from *Society for Savings, vs. Bowers*, 349 U. S. 143, 75 S. Ct. 607, 99 L. Ed. 950 (1955):

> Because the question here is whether the tax effects federal immunity, it is clear that *for this*

> *limited purpose* we are not bound by the State Court's characterization of the tax. (Emphasis added)

See also *Agricultural National Bank vs. State Tax Commission*, 392 U.S. 339, 88 S. Ct. 2173, 20 L. Ed.2d 1138 (1968). But it is apparent that even where the constitutional validity of the state's scheme is in question, Federal Courts are obligated to give State determinations great effect in their consideration. In *American Oil Company vs. Neill*, 380 U. S. 451, 85 S. Ct. 1130, 14 L. Ed.2d 1 (1965), the Court said:

> When a State Court has made its own definitive determination as to the operating incidence, our task is simplified. We give this finding great weight in determining the natural effect of the statute, and if it is consistent with the statute's reasonable interpretation, it will deemed conclusive.

Based on the clear intent of both the federal and state legislatures to impose this tax upon the producer distributor, and the Mississippi Supreme Court decision that the legal incidence of the tax in fact falls upon the producer/distributor, the respondent respectfully submits that the petitioner's contentions to the contrary are unpersuasive, and that his Petition should be denied.

SUMMARY OF ARGUMENT

POINT 1

UNITED STATES AND MISSISSIPPI EXCISE TAXES ARE BY DEFINITION AND STATUTE IMPOSED ON THE DISTRIBUTOR NOT THE CONSUMER.

Excise taxes by definition are impost for licenses to pursue certain callings to exercise particular franchises

and to obtain certain privileges. *East Ohio Gas Company vs. Tax Commissioner of Ohio*, 43 F. 2d 170, 172 (DC Ohio 1930), *American Airways, Inc. vs. Wallace*, 57 F.2d 877, 880 (DC Tennessee 1932).

Both the language of the federal gasoline excise tax statute (Title 26, Chapter 32 *U. S. Code* Sections 4081, et seq.) and the legislative intent shown by the congressional record cited in *Martin Oil Service, Inc. vs. Illinois Department of Revenue*, 49 Ill.2d 262, 273 N. E.2d 823, Cert. denied 405 U. S. 923 (1971) clearly show that this tax is imposed on the distributor. Respondent submits that the *Martin* case is the most complete, definitive and persuasive statement of a State Supreme Court prior to the decision of the instant case.

Both the explicit language of the Mississippi gasoline excise statute, Section 27-55-11 of the Mississippi Code of 1972, and the testimony adduced in the trial court in this cause clearly show that tax liability attaches to the distributor at the time the gasoline enters Mississippi. The ultimate consumer has no liability to Mississippi to pay such tax and the distributor has no immunity or exception from the liability to pay such tax if the gasoline is lost or otherwise unsold.

Cases cited by Petitioner construing statutes which expressly provide for this tax to be passed along to the ultimate user obviously have no application of the Mississippi tax statute which has no such provision.

POINT 2

THE LEGAL INCIDENCE OF THE GASOLINE EXCISE TAX AS IMPOSED BY 26 U. S. C. SECTION 4081 AND MISS. CODE ANN. SECTION 27-55-11 (1972) HAS BEEN CONSTRUED BY FEDERAL AND STATE COURTS TO FALL ON THE DISTRIBUTOR.

A majority of the jurisdictions have concluded that the legal incidence of gasoline excise taxes is on the distributor and therefore includable in the base for sales tax. *Gurley vs. State Tax Commission*, 288 So. 2d 868 (Miss. 1974). *Sun Oil Company vs. Gross Income Tax Division*, 238 Ind. 111, 149 N. E.2d 115 (Ind. S. Ct.). *State of Georgia vs. Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S. E. 2d 224, affirmed by the Georgia Appellant Court in 226 Ga. 883, 178 S. E.2d 173. *Martin Oil Service, Inc. vs. Department of Revenue*, 49 Ill.2d 260, 273 N. E. 2d 823 (Ill. S. Ct., Sept. 30, 1971), Cert. denied by United States Supreme Court in docket number 71-845, February 22, 1972. *Pure Oil Company vs. State of Alabama*, 244 Ala. 258, 12 S.2d 861, 148 ALR 260.

The cases of *Standard Oil Company vs. State Tax Commissioner of North Dakota*, 71 N. D. 176, 299 N. W. 447, 135 ALR 1481, and *Standard Oil vs. State of Michigan*, 283 Mich. 85, 276 N. W. 908, cited by the petitioner for the proposition that the legal incidence of the federal tax fell on the purchaser, did not consider or determine the question of the legal incidence of the tax. In the case of *Tax Review Board vs. Esso Standard, Division of Humble Oil and Refining Company*, 424 Pa. 335, 227 A.2d 657, the Court relied on a reading of *Panhandle Oil vs. State of Mississippi ex rel. Knox*, 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857 (1928) and *Indian Motorcycle*

Company vs. United States, 283 U. S. 570 51 S. Ct. 601, 15 L. Ed. 1277 (1931), that was characterized as inaccurate by other federal Courts in *Dow Jones and Company vs. United States*, 128 F. Supp. 748 (1955) and *Martin's Auto Trimming, Inc. vs. Riddell*, 283 F. 2d 503 (1960).

The latest, soundest and most complete decision on the issues presented in this case is *Martin Oil Service, Inc. vs. Illinois Department of Revenue*, Supra, where the petitioner operated wholesale and retail outlets in Illinois and contended that the federal gasoline excise tax should not be included in his gross receipts subject to the Illinois Retailers' Occupation Tax. In finding that the legal incidence of the Illinois Occupation Tax was on the distributor, the Court emphasized the fact that unpaid excise tax could not be recovered from the consumer, the fact that the distributor was under no legal duty to pass the burden of the tax on to the consumer, and the fact that if a distinction should be recognized between an operator who is a producer-retailer and an operator who is merely a retailer, producer-retailers would be able to sell gasoline at a lower price than an operator who was a mere retailer.

See also *Jerry M. Ferrara vs. Director, Division of Taxation*, Volume 2, Commerce Clearing House, Inc., New Jersey State Tax Reports, New Matters, Paragraphs 200-583, Division of Tax Appeals, March 8, 1973.

Petitioner bases his contention that the legal incidence of the Mississippi Gasoline Excise Tax falls on the consumer on the decision rendered in *Panhandle Oil Company vs. Mississippi ex rel. Knox*, Supra. That case was overruled by *Alabama vs. King and Boozer*, Supra, and was contrary to decisions of the Mississippi Supreme Court in

State ex rel Knox vs. Panhandle Oil Company, 147 Miss. 663, 112 So. 584 (1927) and *City of Jackson vs. State ex rel. Mitchell, Atty. General*, 156 Miss. 306, 126 So. 2 (1930). Petitioner also relies on dicta contained in Mississippi Supreme Court Decision *State ex rel. Rice vs. Republic Oil Refining Co.*, 202 Miss. 688, 32 So. 2d 290 (1947), which has never been recognized either by the State of Mississippi or the United States Government as construing the act insofar as the incidence of the tax is concerned, and is contrary to the reasoning contained in *Treas vs. Price*, 167 Miss. 121, 146 So. 630 (1933).

The most recent decision dealing with the incidence of the Mississippi gasoline tax is *United States vs. Sharp, Motor Vehicle Comptroller* 302 F. Supp. 668 (S. D. Miss. 1969), in which a three judge constitutional Court found that the ". . .tax burden in the Mississippi statute falls plainly and squarely on the distributor. . . .. and that ". . . Mississippi's gasoline tax is not such a tax to afford immunity to the Plaintiff, except when it has received specific exemptions such as for gasoline used by the Armed Forces of the United States."

And in a case considering a statute similar to the one in issue here, *State of Louisiana vs. Atlas Pipe Line Corporation*, 33 F. Supp. 160 (D. C. La. 1940), the Court recognized the legal duty of a corporate distributor to be responsible for the tax irrespective of its collection of the tax from the purchaser.

Decisions of other Courts on which petitioner relies involve gasoline excise statutes that require that the tax be passed on to the ultimate consumer. *State of Georgia vs. Thoni Oil Magic Benzol Gas Stations, Inc.*, Supra. See

also *Jerry M. Ferrara vs. Director, Division of Taxation*, Supra.

Mere economic incidence is not determinative of the question of legal incidence, *Tax Review Board vs. Esso Standard Division*, 424 Pa. 355, 277 A.2d 657, cert. denied, 389 U. S. 824, 88 S. Ct. 63, 19 L. Ed.2d 79 (1968). *Lash's Products Company vs. United States*, Supra. Respondent respectfully submits that there are no constitutional or legal bars to inclusion of the federal and Mississippi excise taxes within state sales tax base, and that further the fact that the petitioner has qualified as a distributor, and paid taxes pursuant to his qualification under the Federal and Mississippi Acts, precludes petitioner's argument that because he is a distributor and retailer, he is entitled to deduct gasoline excise taxes before computing his sales tax liability. Such preferred treatment would be arbitrary and discriminatory, and certainly inconsistent with the Mississippi statute.

POINT 3

STATE COURT DETERMINATIONS OF THE OPERATING INCIDENCE OF THEIR TAXING SCHEMES HAVE BEEN ACCEPTED AS CONTROLLING BY FEDERAL COURTS.

Questions of construction of state statutes lie within the exclusive province of State Supreme Courts, *Alabama vs. King and Boozer*, Supra, and determinations of the highest State Courts as to the incidence of a tax of that state is controlling on Federal Courts. *Federal Land Bank of St. Paul vs. Bismarck Lumber Co.*, 314 U. S. 95, 62 S. Ct. 1, 86 L. Ed. 65. *United States vs. Sharp*, Supra. It is only when the question of federal immunity is raised

that federal Courts may examine the state taxing schemes to determine the operating incidence, *Society for Savings* vs. *Bowers*, 349 U. S. 143, 75 S. Ct. 607, 99 L.Ed. 950 (1955), but even in those cases where a state Court has made its own definitive determination as to the operating incidence, that finding is given great weight and in the absence of blatent error, will be deemed conclusive. *American Oil Company vs. Neill*, 380 U. S. 451, 85 S. Ct. 1130, 14 L. Ed.2d 1 (1965).

CONCLUSION

In conclusion of the argument, Respondent would urge that the Petitioner has made no showing to the United States Supreme Court which would justify the granting of certiorari for the purpose of considering the Petitioner's arguments which were heard and rejected in the Mississippi Supreme Court. No question of Federal immunity exists here and no viable Federal constitutional question.

This Court and inferior Federal Courts have held on many occasions that the determination of a State Court as to the incidence of an item of State taxation should be accepted as final, at least if not blatently in error.

The early decisions of this Court and inferior Federal Courts would clearly support the determination that the incidence of the United States gasoline excise tax is upon the distributor and not the ultimate consumer, economic incidence being of no consequence by the overwhelming weight of authority. The language of both the United States and Mississippi statutes, the weight of the Congressional intent in adopting the Federal statute and the holdings of a majority of the State jurisdictions which

have addressed this question, all overwhelmingly support the Respondent's position and lend weight and authority to the decision of the Mississippi Supreme Court in this case.

For these reasons no substantial question of law requiring the attention of the United States Supreme Court has been raised and supported by the Petition in this cause. We therefore respectfully urge that certiorari be denied.

Respectfully submitted,

ARNY RHODEN, COMMISSIONER,
CHAIRMAN OF THE STATE TAX
COMMISSION FOR THE STATE
OF MISSISSIPPI, RESPONDENT

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CERTIFICATE OF SERVICE

I, Hunter M. Gholson, one of the counsel for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of October, 1974, I served copies of the foregoing Response to the Petition for Writ of Certiorari to the Supreme Court for the United States on all parties required to be served, by depositing a copy of said Response in the United States Post Office properly addressed, with first class postage prepaid, to Mr. Walter P. Armstrong, Jr. and Hubert A. McBride, 15th Floor Commerce Title Building, Memphis, Tennessee 38103; and Charles R. Davis, David H. Nutt and Thomas W. Tardy, III, 507 First National Bank Building, Post Office Drawer 1532, Jackson, Mississippi 39205, Counsel for Petitioner.

HUNTER M. GHOLSON

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1734

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Petitioner,

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi, reported in 288 So.2d 868 (Miss. 1974), is attached to the petition for a writ of certiorari as Appendix A. The opinion of the Chancery Court of the First Judicial District of Hinds County, Mississippi, is attached to the petition for a writ of certiorari as Appendix B.

JURISDICTION

The opinion of the Supreme Court of the State of Mississippi was rendered on January 28, 1974; timely petition for rehearing was denied on February 18, 1974. The petition for a writ of certiorari was filed on May 20, 1974 and was granted on November 18, 1974. The jurisdiction of this Court rests on 28 *U.S.C.*, § 1257(3).

QUESTIONS PRESENTED

1. Whether 26 *U.S.C.*, § 4081 imposes a federal excise tax on gasoline upon the seller, in the nature of a "privilege tax", or upon the buyer consumer, in the nature of a "use tax", the latter of which would prevent a state from including such tax within its sales tax base, such tax having been merely collected by the gasoline dealer and held by him for the federal government.

2. Whether the imposition of a state sales tax on federal excise taxes collected and held by a gasoline dealer for the Federal Government is violative of (a) the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States; and (b) the Federal Government's constitutional immunity from taxation by a state.

3. Whether the imposition of Mississippi sales tax on Mississippi gasoline excise taxes collected and held by a gasoline dealer results in a deprivation of the gasoline dealer's property without due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

1. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

Statutory Provisions:

1. Title 28, *U.S.C.*, § 1257, provides in part as follows:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

2. Title 26, *U.S.C.*, § 4081, provides in part as follows:

> "(a) In General—There is imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

3. Title 26, *U.S.C.*, § 4082, provides in part as follows:

"(a) Producer—As used in this subpart, the term 'producer' includes a refiner, compounder, blender, or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer. Any person to whom gasoline is sold tax free under this subpart shall be considered the producer of such gasoline."

4. Title 26, *U.S.C.*, § 4083, provides as follows:

"Exemption of sales to producer—Under regulations prescribed by the Secretary or his delegate the tax imposed by section 4081 shall not apply in the case of sales of gasoline to a producer of gasoline."

5. Title 26, *U.S.C.*, § 6420(a) provides in part as follows:

"Gasoline—Except as provided in subsection (h), if gasoline is used on a farm for farming purposes, the Secretary or his delegate shall pay (without interest) to the ultimate purchaser of such gasoline the amount determined by multiplying—

"(1) the number of gallons so used, by

"(2) the rate of tax on gasoline under section 4081 which applied on the date he purchased such gasoline."

6. Title 26, *U.S.C.*, § 6421 provides in part as follows:

"(a) Nonhighway uses.—Except as provided in subsection (i), if gasoline is used otherwise than as a fuel in a highway vehicle (1) which (at the time of such use) is registered, or is required to be registered, for highway use under the laws of any state or foreign country, or (2) which, in the case of a highway vehicle owned by the United States, is used on the highway,

the Secretary or his delegate shall pay (without interest) to the ultimate purchaser of such gasoline an amount equal to 1 cent for each gallon of gasoline so used on which tax was paid at the rate of 3 cents a gallon and 2 cents for each gallon of gasoline so used on which tax was paid at the rate of 4 cents a gallon. . . .

"(b) Local transit systems.—

"(1) Allowance.—Except as provided in subsection (i), if gasoline is used during any calendar quarter in vehicles while engaged in furnishing scheduled common carrier public passenger land transportation service along regular routes, the Secretary or his delegate shall, subject to the provisions of paragraph (2), pay (without interest) to the ultimate purchaser of such gasoline the amount determined by multiplying—

"(A) 1 cent for each gallon of gasoline so used on which tax was paid at the rate of 3 cents a gallon and 2 cents for each gallon of gasoline so used on which tax was paid at the rate of 4 cents a gallon, by

"(B) the percentage which the ultimate purchaser's commuter fare revenue derived from such scheduled service during such quarter was of his total passenger fare revenue derived from such scheduled service during such quarter. . ."

7. Act of June 8, 1966, Ch. 645, § 6, (1966) Gen. Laws Miss. 1343 provides in part as follows:

"Any person engaged in business as a distributor, or who acts as a distributor as defined in this act, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to and computed as follows:

"(a) Seven cents (7¢) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this State or received in this State for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose. . . .

* * *

"Provided that the tax herein imposed and assessed shall be collected and paid to the State of Mississippi but once in respect to any gasoline . . .

* * *

"Provided that the tax levied by this section may be passed on to the ultimate consumer, and such consumer in ascertaining his net income for income tax purposes may deduct any such taxes he has actually paid, upon proof satisfactory to the Income Tax Commissioner, during the year, from his gross income, provided the total deductions shall not exceed in any one (1) year ten per cent (10%) of the person's net income, and such tax shall be collected in the same manner as heretofore."

8. MISS. CODE ANN. § 27-55-3 (1972), provides in part as follows:

"It is declared to be the purpose and intention of the legislature to impose an excise tax to provide highways, streets and roads, on all persons engaged in the business as a distributor of gasoline in this state, computed at the rate stated herein, subject to the exemptions and refunds herein set forth. . ."

9. MISS. CODE ANN., § 27-55-5 (1972), provides in part as follows:

"(c) 'Distributor of gasoline' shall mean: (1) any person who shall sell or distribute gasoline for

resale or use, or (2) any person importing, receiving, purchasing, acquiring, using, storing, or selling any gasoline in this state on which the gasoline excise tax hereinafter imposed by this article has not been paid or the payment of which is not covered by the bond of a qualified Mississippi distributor of gasoline. All refiners, processors, marine terminal operators, or pipeline terminal operators shall qualify as distributors of gasoline as provided in this article.

* * *

"(j) The term 'for nonhighway purposes,' as used in this article, shall be construed to mean gasoline used for any other purpose than agricultural, maritime, industrial, manufacturing or domestic purposes, and no part of which is used for operating motor vehicles or motor-propelled machines of any description along the public roads, streets, alleys or highways (as defined in this article) of this state."

10. MISS. CODE ANN., § 27-55-7 (1972), provides in part as follows:

> "Before any person shall engage in business as a distributor of gasoline in this state, he shall first make application to the comptroller, upon forms prescribed by the comptroller, for a permit to engage in said business. . . ."

11. MISS. CODE ANN., § 27-55-11 (1972), provides in part as follows:

> "Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to eight cents per gallon on all gasoline stored, sold, distributed, manufactured, refined, dis-

tilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose.

* * *

"Provided that the tax herein imposed and assessed shall be collected and paid to the State of Mississippi but once in respect to any gasoline. . . .

* * *

"With respect to distributors or other persons who bring, ship, have transported, or have brought into this state gasoline by means other than through a common carrier, the tax accrues and the tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when and at the point where such gasoline is brought into the state."

12. MISS. CODE ANN., § 27-55-13 (1972), provides in part as follows:

"For the purpose of determining the amount of his liability for the tax imposed by this article each bonded distributor of gasoline shall, not later than the 20th day of the month next following the month in which this article becomes effective, and not later than the 20th day of each month thereafter, file with the comptroller a monthly report which shall include a statement of the number of gallons of gasoline received by such distributor within this state during the preceding calendar month, and such other information as may be reasonably necessary for the proper administration of this article.

"At the time of filing each monthly report with the comptroller, each distributor of gasoline shall pay to the comptroller the full amount of the gasoline tax

due from such distributor for the preceding calendar month less two per cent to cover evaporation, shrinkage and other normal losses. . . ."

13. MISS. CODE ANN., § 27-55-19 (1972), provides in part as follows:

> "There shall not be included in the measure of the tax levied hereunder, any gasoline:
>
> "(a) Sold or delivered by a bonded distributor of gasoline to a second bonded distributor of gasoline within this state, but nothing in this exclusion shall exempt the second bonded distributor of gasoline from paying the tax, unless the second bonded distributor of gasoline sells or delivers said gasoline to a third bonded distributor of gasoline in which event the third bonded distributor of gasoline shall be liable for the tax. . . ."

14. MISS. CODE ANN., § 27-55-23 (1972), provides in part as follows:

> "Any person who shall purchase and use gasoline for agricultural, maritime, industrial, or domestic purposes, as defined in this article, which is not used in operating motor vehicles upon the highways of this state, shall be entitled to a refund of all but one cent per gallon of the tax actually paid on gasoline which is used for agricultural, maritime, industrial, domestic, or nonhighway purposes, as herein defined, provided that no such refund shall be payable unless the provisions of this article are complied with. . . ."

15. MISS. CODE ANN., § 27-55-27 (1972), provides in part as follows:

> "When gasoline is lost or destroyed in quantities of seven hundred fifty gallons or more through ex-

plosion, fire, collision, storage tank wreckage, wreckage of loading or unloading facilities, such as pumps and lines, or acts of Providence while in storage in this state or while being transported in this state, the owner of such gasoline shall be entitled to tax credit or refund of the tax paid thereon. . . ."

16. MISS. CODE ANN., § 27-65-13 (1972), provides as follows:

"There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

17. MISS. CODE ANN., § 27-65-17 (1972), provides in part as follows:

"Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed and shall be collected a tax equal to five per cent of the gross proceeds of the retail sales of the business, except as otherwise provided herein. . . ."

18. MISS. CODE ANN. § 27-65-3(g) (1972), provides as follows:

" 'Gross proceeds of sales' means the value proceeding or accruing from the full sale price of tangible personal property including installation charges, carrying charges, or any other additions to selling price on account of deferred payments by purchaser, without any deductions for freight, cost of property sold, other expenses or losses, or taxes of any kind except those expressly exempt by section 27-65-29, Mississippi Code of 1972. . . ."

STATEMENT

Petitioner, W. M. Gurley, d/b/a Gurley Oil Company, operates as a sole proprietorship with his office and principal place of business located in West Memphis, Arkansas. Gurley owns and operates five (5) gasoline stations in Mississippi and sells gasoline on a consignment basis to four (4) other Mississippi stations. However, the consignment sales are not in issue on this appeal [App. 41-42).

Mr. Gurley purchases the gasoline and diesel fuel that is sold in his retail stations in Mississippi from sources of supply in Tennessee and Arkansas [App. 42-43]. No federal or state excise tax is paid on the gasoline at the time of its purchase. Mr. Gurley is not a wholesaler or a distributor, but Gurley Oil Company is a retailer of gasoline and diesel fuel. Said gasoline and diesel fuel are transported in Gurley's own trucks directly to his retail outlets in Mississippi, where sales are made to the ultimate consumer with no distribution or wholesale step being involved, thereby eliminating the middle man, and, consequently, placing Gurley's stations on a competitive basis with those supplied by the major oil companies. Gurley Oil Company is not a manufacturer of gasoline or diesel fuel [App. 42-43, 48, 58].

The federal excise tax on the sale of gasoline is collected from the consumer and remitted twice monthly to a Federal depository, based on the number of gallons sold in the time period involved [App. 46-49].

The Mississippi excise tax on gasoline is collected from the consumer and remitted on a monthly basis, also calculated by a charge per number of gallons sold [App. 48-50].

A.

Computation by Gurley of Mississippi Sales Tax on Retail Sales of Gasoline.

The Mississippi Sales Tax Law [MISS. CODE ANN., §§ 27-65-1 to 95 (1972)][1] imposes a tax equal to five per cent (5%) of the gross proceeds of the retail sales of any business within the State of Mississippi selling any tangible personal property whatsoever.

The Mississippi sales tax on the retail sale of gasoline by Gurley Oil Company at the Mississippi retail service station is computed by Gurley in the following manner:

Gas purchase price from Tennessee and Arkansas sources of supply .... 14¢ per gal.

Gross proceeds of retail sale to ultimate consumer .... 20¢ per gal.

Mississippi sales tax collected from consumer (5% on 20¢) .... 01¢ per gal.

Total gross proceeds of sale plus 1¢ sales tax collected from ultimate consumer .... 21¢ per gal.

Gasoline excise tax collected from ultimate consumer:

Federal gasoline excise tax 04¢ per gal.

Miss. gasoline excise tax 07¢ per gal.

Total sum collected by retail service station operation from ultimate consumer for gasoline purchase price, sales tax and excise taxes .... 32¢ per gal.

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1. At the time of the filing of the original bill of complaint the applicable law was cited to the then effective Mississippi Code as MISS. CODE ANN., §§ 10103-10139 (1942). The Mississippi Code of 1972 became effective November 1, 1973.

The purchase price of the gasoline of 14 cents paid to the supplier in Arkansas or Tennessee is an approximate and illustrative amount since purchases of both regular and premium gasoline are made and since, of course, the price of gasoline fluctuates frequently on account of the market condition. Obviously, the retail sales price would also vary in accordance with Gurley's cost per gallon. Furthermore, the Mississippi gasoline excise tax increased from 7 cents to 8 cents per gallon on January 2, 1970.[2] The above computation is, however, illustrative of the manner in which Gurley computes the amount of Mississippi sales tax due to the State of Mississippi on the retail sale of gasoline at the retail service stations of Gurley Oil Company in the State of Mississippi. Obviously, the federal and state excise taxes on the sale of gasoline were not included by Gurley in gross proceeds of sale for the purpose of computing the amount of sales tax due to the State of Mississippi [App. 42-45].

As shown in the above computation, the five per cent (5%) Mississippi sales tax on the gross sales price of the gasoline of 20 cents per gallon or 1 cent per gallon is collected from the ultimate consumer by Gurley and is, in turn, remitted to the State of Mississippi in the monthly sales tax returns filed by Gurley. However, no sales tax was collected by Gurley from the ultimate consumer on the federal and state gasoline excise taxes. The State Tax Commissioner made additional assessments against Gurley for such sales taxes which he alleged to be due and Gurley was required to pay such amounts to the Commissioner. Gurley now seeks to recover such amounts paid under protest by him due to his refusal to pay sales tax based upon the inclusion of state and federal excise tax within

2. The Mississippi gasoline excise tax increased from 8¢ to 9¢ per gallon on July 1, 1973. Though this increase did not occur during the period covered by the case *sub judice*, suit has been filed to recover taxes paid during this later period.

the sales tax base. Gurley bore the burden of the taxes sued for and did not directly or indirectly collect such taxes from the ultimate consumer on any of the retail sales of gasoline made by Gurley in the State of Mississippi [App. 44-45].

B.

Gurley's Method of Collection of Federal Excise Tax from the Ultimate Consumer on the Sale of Gasoline.

26 *U.S.C.*, § 4081, imposes a federal excise tax on the sale of gasoline by the producer thereof in the amount of 4 cents per gallon. As shown in the illustrative computation hereinabove, this 4 cents tax on the retail sale of gasoline is collected by Gurley Oil Company from the ultimate consumer at the time of the retail sale. The amount of federal excise tax collected by Gurley from the ultimate consumer is remitted to a Federal depository on a form bearing the registration number assigned to Gurley Oil Company by the Internal Revenue Service within 3 days after the 1st of each month and within 3 days after the 15th of each month. The amount of monies remitted to the Federal depository is ascertained by calculating the actual gallons sold to the ultimate consumer for the time period involved. No monies or funds are actually remitted to the Federal depository until such funds have been collected from the ultimate consumer on the retail sale of gasoline [App. 46-47].

Federal excise tax on the sale of gasoline is collected by Gurley from the ultimate consumer and is payable by him to the Internal Revenue Service, even though Gurley is a retailer of gasoline and not a manufacturer of gasoline.[3] Gurley's registration number (supplied by the In-

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3. 26 *U.S.C.*, § 4082 provides that any person to whom gas is sold tax free is a producer and, consequently, must collect the tax for the United States Government.

ternal Revenue Service) is the same registration number utilized by Gurley in remitting social security withholding taxes on his employees [App. 47]. It should be noted that in remitting the federal excise tax on the sale of diesel fuel, Gurley Oil Company utilizes the same registration number, the same form and remits said funds to the same Federal depository at the same designated times [App. 48-49].[4]

C.

Gurley's Method of Collection of State Excise Tax from the Ultimate Consumer on the Sale of Gasoline.

MISS. CODE ANN., § 10013-06 (1942), which was in effect during part of the contested period, imposed an excise tax on the sale of gasoline in the amount of 7 cents per gallon. On January 2, 1970, MISS. CODE ANN., § 10076-05 (1942) [now MISS. CODE ANN., § 27-55-11 (1972)] became effective, increasing the amount of the excise tax on gasoline to 8 cents per gallon.

The Mississippi excise tax on the sale of gasoline was and is collected by Gurley from the ultimate consumer at the time of the retail sale of the gasoline. The taxes so collected from the ultimate consumer are remitted to the State of Mississippi on or before the 20th day of the succeeding month for sales which were made in the preceding calendar month. In all instances the total amount of the excise taxes remitted to the State of Mississippi on the 20th day of the succeeding month have been collected from the ultimate consumer prior to the remittance. This is true because Gurley never supplies more than a 7-day inventory to his respective retail stations in

4. The federal excise tax on the sale of diesel fuel is not included in the sales tax base by the Mississippi State Tax Commission [App. 45].

Mississippi. Therefore, all inventory placed in the said retail outlets in the latter part of the calendar month would have been sold by the 7th day of the succeeding month and, therefore, the excise taxes on the entire amount of gasoline sold during the preceding month would have been collected at least 13 days prior to the remittance to the State of Mississippi on the 20th day of the month [App. 48-50).

On January 18, 1971, Gurley filed suit to recover sales taxes improperly collected by the State of Mississippi on account of the illegal inclusion by the State Tax Commissioner of the state and federal excise taxes on gasoline within the gross proceeds of the sale for the purpose of computing sales tax liability of Gurley on the retail sales of such gasoline [App. 3]. The State Tax Commission cross-complained for past sales taxes not paid [App. 27]; and the recoverable amounts were stipulated [App. 36-39]. If Gurley won, he was to receive a $62,782.57 refund, and if he lost, his additional liability was determined to be $29,131.19 [App. 36-39]. The State Tax Commission prevailed on all counts and Gurley appealed to the Supreme Court of Mississippi on the grounds that neither state nor federal excise taxes should be subject to the state sales tax. The Mississippi Supreme Court conceded that there were conflicting decisions based upon similar fact situations (fns. 1 and 2 of opinion), but affirmed the lower court's judgment that the federal and state excise taxes were imposed upon the producer or distributor as a privilege tax rather than on the user or consumer as a use tax. Subsequently, judgment was entered for the State Tax Commission [App. 92-93]; a petition for writ of certiorari was filed by Gurley with this Court on May 20, 1974 and granted on November 18, 1974.

SUMMARY OF ARGUMENT

I.

THE IMPOSITION OF A STATE SALES TAX ON A FEDERAL EXCISE TAX VIOLATED PETITIONER'S RIGHT TO EQUAL PROTECTION UNDER THE LAWS, DEPRIVED HIM OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW AND VIOLATED THE FEDERAL GOVERNMENT'S SOVEREIGN IMMUNITY FROM TAXATION.

A.

The Federal Excise Tax on Gasoline Is a Tax upon the Sale, Not the Manufacturer, of Gasoline.

26 *U.S.C.*, § 4081, provides for a federal excise tax on "gasoline sold". The petitioner's business operation is unlike that of most of the major oil companies. Gurley buys gasoline tax free from the manufacturer, and sells it to the ultimate consumer; there is no middleman. Consequently, the federal excise tax cannot possibly attach before Gurley's sale to the ultimate consumer.

This Court has previously ruled that statutes worded similarly to 26 *U.S.C.*, § 4081, imposed taxes upon the sale and not the manufacturer of an item. In *Indian Motocycle Co.* v. *United States*, 283 U.S. 570 (1931), the Court stated that a federal excise tax on motorcycles "sold" was a tax levied upon the sale and not on the manufacturer, producer, or importer of that product. Similarly, in *Panhandle Oil Co.* v. *Miss. ex rel. Knox*, 277 U.S. 218 (1928), the Court, considering a Mississippi excise tax on gasoline "sold", stated that "to use a number of gallons sold . . . as a measure of the privilege tax is in substance and legal

effect to tax the sale." Id. at 222. Though the *Panhandle* decision was later questioned, it was reaffirmed in *Kern-Limerick Inc.* v. *Scurlock*, 347 U.S. 110 (1954).

B.

The Federal Excise Tax Is, Therefore, Not Part of the Sales Price of Gasoline.

Since the federal excise tax on gasoline sold by Gurley is levied upon his sale of the product and attaches upon such sale, it does not come into existence until after the contract of sale has been made and consummated. Therefore, the tax could not possibly be part of the sales price of gasoline sold.

This view has been followed by several state supreme courts in determining that the federal excise tax on gasoline cannot be subject to a state sales tax. In *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N.W. 908, 912 (1937), the Michigan Supreme Court stated that "such fund does not become a part of the 'gross proceeds' realized by the manufacturer from the sale, and is [therefore] not subject to taxation within the meaning of [the Michigan Sales Tax Act] . . ." A similar decision was reached in *Standard Oil Co. of Indiana* v. *State Tax Commissioner*, 71 N.D. 146, 299 N.W. 447 (1941).

C.

The Federal Excise Tax, Is, by Its Language, Legislative Intent and Judicial Interpretation, upon the Consumer (As a Use Tax), Not the Seller (As a Privilege Tax).

Though the federal excise tax on diesel fuel is specifically exempted from the Mississippi sales tax, the identical tax on gasoline is not. However, if the excise tax is deter-

mined to be upon the consumer and merely collected by Gurley, then, regardless of the interpretation of the Mississippi Sales Tax Act, the excise tax cannot be included within the term "gross proceeds of sale" and, consequently, the excise tax itself cannot be taxed.

1. Legislative Intent.

This view of the federal gasoline tax as a tax levied upon the consumer has been supported by the President and Congress of the United States. In 1965, President Johnson called this particular tax a *user tax*. In that same year, Congress, while amending the excise tax law, specifically stated that the tax was a user tax which taxed the users of highways in proportion to their use of the services.

Additionally, Congress has passed legislation which provides that the producer's (tax collector's) use of the gasoline is taxable as a sale (26 *U.S.C.*, § 4082(c)), but the gas is not taxable at all if it is lost or destroyed [for then it is not used on the highways] (Revenue Ruling 64-211). Congress has also enacted refund provisions which allow the *consumer* a refund for gasoline used for non-highway purposes (26 *U.S.C.*, §§ 6420(a), 6421(a)(b)).

These pronouncements underline what should be evidenced from the federal gasoline tax itself, that the tax is levied on and eventually paid by the consumer and that the retailer or producer collecting it does not collect the tax as part of his consideration, but only as an agent for the taxing authority. Consequently, any interpretation of 26 *U.S.C.*, § 4081, as being a tax upon the retailer or producer himself is contrary to the federal statutory provisions, their legislative history and authoritative commentary.

2. Judicial Decisions.

Admittedly, there is a split of lower court authority as to the inclusion of the federal excise tax in a state sales tax base. The better reasoned decisions state that this tax is on the consumer, and, therefore, is not subject to sales tax. See *Tax Review Board* v. *Esso, Standard Division of Humble Oil & Refining Co.*, 424 Pa. 355, 227 A.2d 657 (1967), *cert. denied* 389 U.S. 824 (1967); *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N.W. 908 (1937). See also, *Standard Oil Co. of Indiana* v. *State Tax Commissioner*, 71 N.D. 176, 299 N.W. 447 (1941); *Gulf Oil Corp.* v. *McGoldrick*, 9 N.Y.S.2d 544 (1939); *Kesbec, Inc.* v. *Taylor*, 2 N.Y.S.2d 241 (1938); *Socony-Vacuum Oil Company* v. *New York*, 287 N.Y.S. 288 (1936). The above cases are supported by two decisions of this Court. See, *Panhandle Oil Co.* v. *State of Mississippi ex rel. Knox*, 277 U.S. 218 (1928); *Indian Motocycle Co.* v. *United States*, 283 U.S. 570 (1931).

D.

In Collecting the Federal Excise Tax on Gasoline, Gurley Acts As the Agent of the United States for the Purpose of Such Collection.

It is not unusual for a party to collect and remit a tax that is imposed on another, particularly when, as here, the class of taxpayers upon whom the tax is legally imposed is very numerous. *Paisner* v. *O'Connell*, 208 F.Supp. 397 (D.R.I., 1962).

The agency status of Gurley as only a collector for the government of gasoline excise taxes is further substantiated by the following: (a) The collector must register with the Secretary of the Treasury or his delegate (26 *U.S.C.*, § 7232); and (b) The refund provisions (26

U.S.C., §§ 6420, 6421, concerning gasoline used for non-highway purposes) depend only upon the actual use of gasoline by the consumer and provide only for refunds to the ultimate consumer of the gasoline, not to the producer as the collecting agent.

E.

The Imposition of Sales Tax on the Federal Excise Tax on Gasoline Violates Gurley's Due Process and Equal Protection Rights and Results in a Tax upon the Federal Government.

Consequently, to impose the Mississippi sales tax upon amounts so received by Gurley would be to tax him upon gross receipts which are not his gross receipts, but the gross receipts of the United States. This would not only violate the fundamental conception of right and justice, but it would be taking Gurley's property without the due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States. Furthermore, since other independent oil dealers in those states which do not include the federal excise tax as a part of the sales tax base would not be forced to pay such tax, then the arbitrary imposition of such tax upon Gurley and those other independent oil dealers in his class (who have to pay a sales tax on federal excise tax) would deprive Gurley of the Fourteenth Amendment's guarantee to equal protection of the laws. *Hoeper* v. *Tax Commissioner*, 284 U.S. 206 (1931).

II.

THE IMPOSITION OF MISSISSIPPI SALES TAX ON MISSISSIPPI GASOLINE EXCISE TAXES COLLECTED AND HELD BY GURLEY RESULTS IN A DEPRIVATION OF THE GASOLINE DEALER'S PROPERTY WITHOUT DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Mississippi gasoline excise tax, like the federal excise tax on gasoline, is clearly upon the consumer, and the taxing of such funds collected from the consumer-taxpayer and belonging to the State of Mississippi is a clear taking of petitioner's property under the color of state law without the due process afforded under the Constitution of the United States.

A.

The Panhandle Decision.

In 1928, this Court decided the case of *Panhandle Oil Company* v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928), thereby placing the legal and economic incidence of the Mississippi excise tax upon the consumer (the United States).

In 1941, this Court decided the case of *Alabama* v. *King and Boozer*, 314 U.S. 1 (1941), which explained *Panhandle* by stating that when the economic (not the legal) incidence of a tax fell upon the United States, the tax did not violate the Federal Government's constitutional immunity. *King and Boozer* did nothing to change the *Panhandle* decision that the excise tax was upon the consumer; the later case merely stated that King and Boozer (the contractor) was the consumer and consequently, the United States was not.

In 1954, the Court decided the case of *Kern-Limerick Inc.* v. *Scurlock,* 347 U.S. 110 (1954), which reaffirmed the *Panhandle* decision. That case did not change the *King and Boozer* decision, but merely stated that Kern-Limerick Inc. (the contractor) was the agent for the United States (who was the real purchaser-consumer). Therefore, the tax was upon the United States as a purchaser and, consequently, it was unconstitutional.

Throughout this line of cases, the Court has consistently maintained the doctrine that all of the contested taxes were upon the consumer-user, not the producer-collector, even though the seller or producer was required to report and make payment of the taxes to the state.

B.

Legislative Intent.

An analysis of the pertinent sections of the Mississippi gasoline excise tax indicates that the legislative intent was to impose this tax upon the consumer as a use tax, even though, as pointed out in *Panhandle,* the language of the statute has always contained wording concerning the tax as one on the privilege of engaging in business.

"It is declared to be the purpose and intention of the legislature to impose an excise tax to provide highways, streets and roads . . .", MISS. CODE ANN., § 27-55-3 (1972). This language itself implies that the state excise tax on gasoline is a user tax.

The state refund statutes are also indicative of legislative intent to tax the user, for they provide for refunds to the user of gasoline for nonhighway purposes. MISS. CODE ANN. § 27-55-23 (1972). If the gasoline is lost or destroyed the tax is again refunded. MISS. CODE ANN., § 27-55-27 (1972).

Conclusively, if the tax was in reality one upon the producer for the privilege of doing business, then each producer in the chain of distribution who handled a particular shipment of gasoline would be taxed; however, this is not the case, for MISS. CODE ANN., § 27-55-11 (1972), provides for the tax to be collected and paid only once (regardless of the number of transfers).

Furthermore, in *State* v. *Republic Oil Co.*, 202 Miss. 688, 32 So.2d 290 (1947), the Mississippi Supreme Court decided that the state excise tax on gasoline was upon the consumer.

C.

Judicial Authorities.

The following jurisdictions have determined that the state gasoline excise taxes are not to be included in the state sales tax base. *American Oil Co.* v. *Mahin,* 49 Ill.2d 199, 273 N.E.2d 818 (1971); *State of Georgia* v. *Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E.2d 224 (Ga. App. Ct. 1970), *aff'd,* 226 Ga. 883, 178 S.E.2d 173 (1970); *Kesbec, Inc.* v. *McGoldrick*, 16 N.E.2d 288, 278 N.Y. 293 (1938); *Kesbec, Inc.* v. *Taylor*, 2 N.Y.S.2d 241 (1938).

Consequently, just as the imposition of a state sales tax on the federal excise tax constitutes a violation of Gurley's due process and equal protection rights (Argument I), so too does the imposition of a state sales tax on the state excise tax on gasoline. And, as stated by the Court in *Hoeper* v. *Tax Commissioner*, 284 U.S. 206 (1931);

> ". . . any attempt by a state to measure the tax on one person's property . . . by reference to the property . . . of another is contrary to due process of law as guaranteed by the 14th Amendment." 284 U.S. at 208.

ARGUMENT

I.

THE IMPOSITION OF A STATE SALES TAX ON A FEDERAL EXCISE TAX VIOLATED PETITIONER'S RIGHT TO EQUAL PROTECTION UNDER THE LAWS, DEPRIVED HIM OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW AND VIOLATED THE FEDERAL GOVERNMENT'S SOVEREIGN IMMUNITY FROM TAXATION.[5]

A.

The Federal Excise Tax on Gasoline Is a Tax upon the Sale, Not the Manufacturer, of Gasoline.

26 *U.S.C.*, § 4081, provides as follows:

> "There is hereby imposed on gasoline *sold* by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ a gallon." [Emphasis added]

26 *U.S.C.*, § 4082, defines a producer within the meaning of the above quoted statute as:

> "(a) *Producer*—As used in this subpart, the term 'producer' includes a refiner, compounder, blender, or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline as well as a producer. *Any person to whom gasoline is sold tax free shall be considered a producer of such gasoline.*" [Emphasis added]

In determining the application of the above mentioned sections to the business operations of the petitioner, Gur-

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5. *See*, Northrup, *The Measure of Sales Taxes*, 9 VAND. L. REV. 237 (1956), from which a portion of this argument is drawn.

ley, it is of utmost importance to note that he is one of many small independent oil dealers, who purchases his petroleum products directly from the supplier, or manufacturer and sells directly to the ultimate consumer. Therefore, no federal or state excise tax is charged to or passed on to Gurley Oil Company by a supplier or manufacturer who has already reflected the tax in his sales price. The only charge made by the manufacturer or supplier is the basic price of the gasoline. 26 *U.S.C.*, § 4081, imposes an excise tax on "gasoline sold by the producer". In the instant case, the only sale upon which this tax is imposed is Gurley's sale to the consumer, with Gurley being a producer as defined in 26 *U.S.C.*, § 4082. Therefore, the tax could not possibly attach before that sale.

In the usual major oil company operation, there is the involvement of a sale by the manufacturer or major oil company to a distributor, a sale by that distributor to a retail operator and a sale by that retail operator to the ultimate consumer. In such cases, the major oil companies might render an invoice to the distributor or wholesaler which would contain the basic price of the gasoline plus federal excise tax which would be passed on to the distributor and the distributor would then render an invoice to the retail operator which contains the federal excise tax on the sale of gasoline as a part of the price. Alternatively, the federal excise tax might not appear until the sale from the distributor to the retailer. In any event, however, the federal excise tax is remitted to the Federal Government prior to the sale by the retail service station operator to the ultimate consumer in the case of major oil company operations, which is not the case with the operation of the petitioner and others so situated [A. 52-54]. Thus, the word "sold" in § 4081 can only apply to the sale to the consumer-user and said tax is at that time collected from the buyer who is the taxpayer.

Additionally, this Court has previously ruled that similarly worded statutes imposed taxes upon the sale and not the manufacture of an item. In *Indian Motocycle Co. v. United States*, 283 U.S. 570 (1931), the Court considered a federal excise tax on motorcycles which provided:

> "There shall be levied, assessed, collected and paid upon the following articles *sold* or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased. Revenue Act of 1924, § 600, 43 Stat. 322." [Emphasis added].

The Supreme Court stated:

> "Both parties rightly regard the tax as an excise, and not a direct tax on the articles named. . . . We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale. . . . Counsel for the government base their contention on the requirement that the tax be paid by 'the manufacturer, producer, or importer;' but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation." 283 U.S., at 573, 574.

In *Panhandle Oil Co. v. Miss. ex rel. Knox*, 277 U.S. 218 (1928), the Supreme Court, in considering the question of the legal incidence of the Mississippi excise tax on gasoline, decided that the tax was upon the sale.[6] The Court stated that:

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6. As discussed in point II of Argument, the Court, in Kern-Limerick Inc. v. Scurlock, 347 U.S. 110 (1954), reaffirmed the *Panhandle* decision.

". . . To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale." Id. at 222.

Though the instant case does not involve the question of constitutional immunity as did *Panhandle*, the Court's holding (that taxes similar to the federal excise tax [identical to the Mississippi excise tax] were upon the sale itself) is vitally important to the case at bar. The cases previously cited are precisely in point upon the question presented here.

B.

The Federal Excise Tax Is, Therefore, Not Part of the Sales Price of Gasoline.

Since the federal excise tax on gasoline sold by Gurley is levied upon his sale of the product and attaches upon such sale, it does not come into existence until after the contract of sale has been made and consummated. Then, for the first time, the tax attaches and becomes a liability. The tax therefore, is not a part of Gurley's sales price, which has already been determined. It is an exaction and an addition to and over and above the sales price. Obviously, the sales price of an article cannot include a tax levied upon that very sale. This view has been followed by several state supreme courts in determining that the federal excise tax cannot be subject to state sales tax.

In *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N.W. 908, 912 (1937), the Michigan Supreme Court said:

"In view of the fact that the federal excise tax and the state sales tax attach at the instant a sale is made, it follows that the federal tax has not become a part of the sale price, but is a fund, which when

collected is payable by the manufacturer to the federal government. Such fund does not become a part of the 'gross proceeds' realized by the manufacturer from the sale, and is not subject to taxation within the meaning of Act No. 167, Pub. Acts 1933. . . ."

In *Standard Oil Co. of Indiana* v. *State Tax Commissioner*, 71 N.D. 146, 299 N.W. 447, 450 (1941), the North Dakota Court said:

"The instant the sale is made, the Federal Government says, 'This sale is subject to, and there is laid upon it, a tax of 1 cent (now 1-1/2 cents) for each gallon sold', and the State says, 'This sale is subject to, and there is laid upon it, a tax of two percent on the total amount of the sales price "valued in money or otherwise"'. In these circumstances it seems entirely clear that the amount of the Federal excise tax thus collected by the seller from the buyer for payment to the Federal Government of the tax laid by it upon the sale, does not become part of the 'gross receipts' realized by the seller from the sale within the purview of the State Sales Tax Act." [Emphasis added].

C.

The Federal Excise Tax Is, by Its Language, Legislative Intent and Judicial Interpretation, upon the Consumer (As a Use Tax), Not the Seller (As a Privilege Tax).

The Mississippi sales tax statute provides for a tax on gross proceeds of sales, which is defined in § 27-65-3(g), MISS. CODE ANN. (1972), as follows:

"(g) 'Gross proceeds of sales' means the value proceeding or accruing from the full sale price of tangible personal property including installation charges,

carrying charges, or any other addition to the selling price on account of deferred payments by the purchaser, without any deduction for freight, cost of property sold, other expenses or losses, or taxes of any kind except those expressly exempt by section 27-65-29, Mississippi Code of 1972."

The exemptions contained in MISS. CODE ANN. (1972), § 27-65-29, include federal retailer's excise taxes, but make no mention of the federal excise tax on gasoline.

However, if the excise tax is determined to be a tax upon the consumer which attaches at the time of the sale and is merely collected by the retailer, then, regardless of the interpretation of the Mississippi Sales Tax Act, these proceeds cannot be included within the term "gross proceeds of sale." These proceeds would be classified as monies held for the United States Government and not proceeds which are included in the gross revenues of sales of petitioner Gurley.

The language of the statutes involved and the legislative commentary on those enactments compel the conclusion that the federal gasoline tax should not be included in the base on which the Mississippi sales tax is computed. While the cases dealing with this issue are split, the better reasoned decisions lead to the same conclusion.

1. Legislative Intent.

This view of the federal gasoline tax as a tax levied upon the consumer has been supported by both the President and Congress of the United States.[7]

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7. The federal gasoline tax is derived from the Revenue Act of 1932, Act of June 6, 1932, Pub. L. No. 72-154, c. 209, § 617, 47 Stat. 169, 266-67. The refund provisions were enacted by Act of April 2, 1956, Pub. L. No. 84-466, c. 160, § 1, 70 Stat. 87, and Act of June 29, 1956, Pub. L. No. 84-627, c. 462, § 208(c), 70 Stat. 374, 394.

In his message to Congress of May 17, 1965, President Johnson stated that "reform of the excise tax structure will leave . . . excises on alcoholic beverages, tobacco, *gasoline*, tires, trucks, air transportation (and a few *other user-charges* and special excises) . . ." [Emphasis added]. H.R. Doc. #173, 89th Cong., 1st Sess. 3 (1965).

Congress has been more explicit. The House Ways and Means Committee has reported that the excise tax reduction of 1965, Pub.L.No. 89-44, 79 Stat. 136, amending the Internal Revenue Code of 1954, was designed to "leave a tax system in which [certain] . . . of the remaining excise taxes . . . are levied on the benefit principle." "Under this principle," the Committee reported, "those who benefit from particular government services help to pay the cost of the services by paying charges (in the form of excises) which to some extent measure their use services. Included in this category of taxes are those on *gasoline*, tires and tubes, and other revenues allocated to the highway trust fund." [Emphasis added]. H.R. Rep. No. 433, 89th Cong., 1st Sess. 11 (1965). In the same report, the Committee continued:

> "Taxes such as those on gasoline . . . are *user taxes* . . . a tax on gasoline taxes users of the highway in rough proportion to their use of the services." Id., at pps. 14-15. [Emphasis added].

Moreover, Congress specifically provided that when a producer *uses* gasoline produced or imported by him, such use shall be considered a sale, raising tax liability [26 *U.S.C.*, § 4082(c)], thus reinforcing the proposition that the federal gasoline tax is, in reality, a tax on the user. Supporting the same conclusion is Revenue Ruling 64-211, 1964-2 Cum. Bull. 421, in which the Internal Revenue Service ruled that a producer is not liable for the

tax when his consignee loses the gasoline through evaporation or spillage and the gasoline never reaches the ultimate consumer.

Also, of decisive significance is the fact that Congress has provided in certain instances, to refund federal gasoline taxes to the *ultimate consumer* even though they were originally remitted by a producer. For example, the tax on gasoline used on a farm for farming purposes is refunded directly to the consumer of that gasoline [26 *U.S.C.*, § 6420(a)]. Similarly, the tax is refunded to the ultimate consumer at the rate of 50 per cent when the gasoline is used for nonhighway purposes [26 *U.S.C.*, § 6421(a)], or by local transit systems [26 *U.S.C.*, § 6421 (b)]. Even though the tax is collected for the Federal Government by the producer, Congress provided that it should be refunded directly to the consumer in these instances. In light of these refund provisions, if this Court were to rule that the legal incidence of the tax here in question is on the producer, rather than the consumer, it would seem a most serious question as to whether the refund provisions of the federal gasoline tax constitute an unconstitutional use of the taxing power. It is difficult to conceive that such an anomalous result was intended by the Congress.

These pronouncements underline what should be evidenced from the federal gasoline tax itself, that the tax is levied and eventually paid by the consumer and that the retailer collecting it does not collect the tax as part of his consideration, but only as an agent for the taxing authority. Consequently, any interpretation of the federal statutory provisions as being a tax upon the producer or the retailer himself is contrary to federal statutory provisions, their legislative history and authoritative commentary.

2. Judicial Decisions.

As indicated above, there is a split of authority relating to whether the federal excise tax should be included in the base on which a state sales tax should be measured.

In *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N.W. 908 (1937), the Michigan Supreme Court considered the exact question presented in this case. That court determined that the sales tax levied by the State of Michigan could not include in its tax base federal excise tax collected on the retail sales of gasoline.

In reaching this decision, the court noted that the plaintiff made retail sales as a producer directly to the consumer without any prior sale to any intermediate distributor. The court interpreted the plain language of the federal excise tax statute as indicating that said tax was a tax on the *sale* of gasoline, and given that logical interpretation, made the following statement:

> "In view of the fact that the federal excise tax and the state sales tax attach at the instant a sale is made, it follows that the federal tax has not become a part of the sale price, but is a fund, which when collected is payable by the manufacturer to the federal government. Such fund does not become a part of the 'gross proceeds' realized by the manufacturer from the sale, and is not subject to taxation within the meaning of Act No. 167, Pub. Acts 1933. [The Michigan Sales Tax Act]"

In the case of *Tax Review Board* v. *Esso, Standard Division of Humble Oil & Refining Co.*, 424 Pa. 355, 227 A.2d 657 (1967), *cert. denied* 389 U.S. 824 (1967), the Pennsylvania Supreme Court fully considered the statu-

tory and historical arguments discussed hereinabove. There, the court was faced with the question of whether that portion of the total sales price which Humble charged the purchaser and later remitted to the United States Government in payment of federal gasoline tax was to be considered part of its "gross receipts" for the purpose of measuring the Philadelphia mercantile tax. Reversing the decision of the Department of Collection in the lower court, the Supreme Court of Pennsylvania initially noted that if Humble were a mere collector of the federal gasoline tax, as agent for the United States, such tax receipts collected must be excluded from the computation of taxable gross receipts (227 A.2d at 658). Then, in response to the department's argument that the federal gasoline tax is imposed upon the producer, and not the consumer, the court squarely met the issue presented here, holding that the federal gasoline tax is a user tax, remitted by the producer, but collected from the consumer, upon whom it legally falls. The court stated (227 A.2d at 658-59):

> "* * * However, it is our considered conclusion that the operative word in Section 4081 of the Internal Revenue Code, supra, is *'sold'* and the particular levy is a sales tax pure and simple. Further, the nature, the size of the tax in relation to the wholesale price of the product, and the purpose thereof compel the conclusion, that it is not and never was intended to be imposed upon the producer, but rather upon the purchaser, the user and prime beneficiary of the facilities that the tax pays for and makes possible. The producer's responsibility is limited to seeing that it is paid; hence realistically and logically it is nothing more than a collector thereof.
>
> "The revenue collected as a result of the tax does not go into the general treasury. Instead, it is placed

in a special fund and is used solely to defray the cost of the federal highway system. It was designed to charge the motorists, who use the highways, with the cost thereof. It has been recognized and characterized by both the President and Congress of the United States as 'user tax'. Moreover, this conclusion is fortified by Section 6420(a) of the Code itself, which provides for a refund *to the purchaser* if the gasoline is used on a farm for farm purposes.

"[5] Our ruling is supported by analogous federal court decisions. See, Panhandle Oil Co. v. State of Mississippi ex rel. Knox, 277 U. S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928); Indian Motocycle Co. v. United States, 283 U. S. 570, 51 S.Ct. 601, 15 L.Ed. 1277 (1931). . . ." [Emphasis added].

See also, *Standard Oil Co. of Indiana* v. *State Tax Commissioner*, 71 N.D. 176, 299 N.W. 447 (1941); *Gulf Oil Corp.* v. *McGoldrick*, 9 N.Y.S.2d 544 (1939); *Kesbec, Inc.* v. *Taylor*, 2 N.Y.S.2d 241 (1938); *Socony-Vacuum Oil Company* v. *New York*, 287 N.Y.S. 288 (1936).

The reasoning of the above authorities clearly indicates that the federal excise tax must be construed as a use tax upon the consumer and, therefore, should not be included in the state sales tax base.

D.

In Collecting the Federal Excise Tax on Gasoline, Gurley Acts As the Agent of the United States for the Purpose of Such Collection.

It is not unusual for a party to collect and remit a tax that is imposed on another, particularly when, as here,

the class of taxpayers upon whom the tax is legally imposed is very numerous.[8]

In *Paisner* v. *O'Connell*, 208 F.Supp. 397 (D.R.I., 1962), a federal court ruled that the excise taxes on jewelry (26 *U.S.C.*, § 2400) collected by a corporation were trust funds belonging to the United States. "[The corporation] was merely *by law* the agent of the United States for their collection and remittance" (208 F.Supp. at 401).[9]

The agency status of Gurley as only a collector for the government of excise taxes on gasoline is further substantiated by the following: (a) The collector must register with the Secretary of the Treasury or his delegate. 26 *U.S.C.*, § 7232; and (b) the refund provisions (26 *U.S.C.*, §§ 6420, 6421, concerning gasoline used for nonhighway purposes) depend only upon the actual use of gasoline by the consumer and provide only for refunds to the ultimate consumer of the gasoline, not to the producer as the collection agent.

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8. The device of funneling tax remittances through administratively convenient conduits is a common one when the class of taxpayers upon whom the tax is legally imposed is very numerous. Indeed, this Court has characterized the use of a distributor as a tax collector as "a familiar and sanctioned device". General Trading Co. v. State Tax Commission, 322 U.S. 335, 338 (1944). See also Monamotor Oil Co. v. Johnson, 292 U.S. 86, 93 (1934); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 68 (1939).

9. See, in addition, United States v. Washington Toll Bridge Authority, 307 F.2d 330 (9th Cir., 1962) (State bridge authority is under duty to collect and pay over to the United States federal excise taxes imposed on amounts paid for transportation); United States v. First Capital Nat. Bank, 89 F.2d 116 (8th Cir., 1937) (athletic board of state university acted as agent of United States in collection of federal admissions tax and funds so received, though unsegregated, were subject to distraint for taxes); Distinctive Theaters, Inc. v. Looker, 62-1 U.S. Tax Cas., ¶15.400 (S.D. Ohio, 1962) (theatre owner was merely agent of Federal Government for collection of admissions tax imposed by § 1700 of the Internal Revenue Code of 1939).

E.

The Imposition of Sales Tax on the Federal Excise Tax on Gasoline Violates Gurley's Due Process and Equal Protection Rights and Results in a Tax upon the Federal Government.

Consequently, to impose the Mississippi sales tax upon amounts so received by Gurley would be to tax him upon gross receipts which are not his gross receipts, but rather the gross receipts of the United States. This would not only violate the fundamental conception of right and justice, but it would be taking the producer's property without due process of the Fourteenth Amendment to the Constitution of the United States. Furthermore, since other independent oil dealers in those states which do not include the federal excise tax as a part of the sales tax base would not be forced to pay such tax, then the arbitrary imposition of such tax upon Gurley and those other independent oil dealers in his class (who must pay a sales tax on federal excise tax), would deprive Gurley of the Fourteenth Amendment's guarantee to equal protection of the laws.

Hence, in *Hoeper* v. *Tax Commissioner*, 284 U.S. 206 (1931), the United States Supreme Court held that the imposition of a graduated net income tax, under which the separate income of Hoeper's wife was added to his separate income, was invalid. Obviously, Hoeper was taxed on the combined total of the two separate incomes. The necessary effect of this procedure was to collect tax upon the wife's income at a higher bracket rate than the rate which would have applied had her separate income been computed and taxed separately. So far as Hoeper was concerned, it compelled him to pay a tax upon his wife's income as *if it were his own income*.

The Supreme Court, in reversing the lower court, stated:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th amendment." 284 U.S. at 208.

The due process and equal protection violations in the instant case are analogous to those in *Hoeper.* Furthermore, the statutory language, legislative intent, and the better reasoned judicial authorities all indicate that the legal incidence of the federal excise tax on gasoline is upon the consumer, not Gurley. Consequently, it is submitted that this Court should reverse the decision of the Mississippi Supreme Court.

II.

THE IMPOSITION OF MISSISSIPPI SALES TAX ON MISSISSIPPI GASOLINE EXCISE TAXES COLLECTED AND HELD BY GURLEY RESULTS IN A DEPRIVATION OF THE GASOLINE DEALER'S PROPERTY WITHOUT DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Mississippi gasoline excise tax, like the federal excise tax on gasoline, is clearly upon the consumer, and the taxing of such funds collected from the consumer-taxpayer and belonging to the State of Mississippi is a clear taking of petitioner's property under the color of state law without the due process afforded under the Constitution of the United States.

A.

The Panhandle Decision.

In support of this position, petitioner would state that this Court has previously ruled upon the question of the legal incidence of the Mississippi excise tax. In *Panhandle Oil Company* v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928), this Court determined that the Mississippi gasoline tax was upon the consumer, not the producer; the Mississippi excise tax law has not been changed in any relevant respect since the rendering of that decision. In the *Panhandle* case, excise tax was sought to be collected for sales of gasoline to the United States for its operations of the U. S. Coast Guard fleet and the Veterans Hospital. The United States claimed that the excise tax was a tax upon the consumer, the United States, not the producer, and, therefore, the tax was unconstitutional under the well-established maxim that a state cannot tax the Federal Government.

The Court decided that both the legal incidence and the economic incidence of the Mississippi state gasoline excise tax was upon the consumer and not the seller and stated:

> "A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitutes a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to

retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. McCullough v. Maryland, 4 Wheat. 316." 277 U.S. at 222.

It should be noted at this point that the original gasoline excise tax law enacted in 1922 (Act of March 25, 1922, Ch. 116 [1922] Gen. Laws Miss. 105) contained the same language in regard to the imposition of the tax as was and is in effect at all times mentioned in the present complaint, as follows:

"Any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of [1¢ per gallon] upon the sale of gasoline."

Despite this language which has been consistently contained in the Mississippi gasoline excise tax law in all its amended forms, including the amendment effective January 2, 1970, the United States Supreme Court looked to the party upon which the burden of the tax was imposed and determined that the consumer was the "real" taxpayer.

In the case of *Alabama* v. *King and Boozer*, 314 U.S. 1 (1941), this Court ruled that its decision in *Panhandle* was "no longer tenable" so far as it held unconstitutional any tax which placed the *economic* burden upon the Federal Government. However, *King and Boozer* left untouched that part of *Panhandle* and other decisions which state that any tax which places the *legal burden* upon the Federal Government *is* unconstitutional. Neither did *King and Boozer* discuss whether the tax was upon the purchaser or the seller. The court merely stated that the contractor, not the Federal Government, was the purchaser; therefore, the tax was upon the contractor (and, consequently, *not* unconstitutional). Later in the

case of *Kern-Limerick Inc.* v. *Scurlock,* 347 U.S. 110 (1954), the Court reaffirmed the principle established in *Panhandle* and *Indian Motocycle, supra,* and cases of like holding. In the *Kern-Limerick* case, a private contractor who had purchased tractors for use in constructing an ammunition dump for the Navy Department, pursuant to its contract authorizing such purchase and providing that with regard to such transactions the United States should have the status of purchaser, paid under protest the amount of sales tax levied under the Arkansas gross receipts tax law, by which sales to any person were made subject to taxation. In an action by the contractor for refund of the tax, the Supreme Court of Arkansas held that the tax was properly levied. The United States Supreme Court reversed this decision on the ground that the legal incidence of the tax fell upon the United States, as ultimate consumer, and that the purchases were protected from state taxation by the doctrine of sovereign immunity. This case is significant in reaffirming the *Panhandle* doctrine which states that a tax upon the sale itself runs to the consumer.[10]

B.

Legislative Intent.

An analysis of the pertinent sections of the Mississippi gasoline excise tax indicates that the legislative intent was to impose this tax upon the consumer as a use tax, even though, as pointed out in *Panhandle*, the language of the statute has always contained wording concerning the tax as one on the privilege of engaging in business.

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10. In its decision in the instant case, the Mississippi Supreme Court summarily stated that the *Panhandle* case was apparently overruled by *King and Boozer*. 288 So.2d 868, 871 (Miss. 1974).

Miss. Code Ann., § 27-55-3 (1972), states in part: "It is declared to be the purpose and intention of the legislature to impose an excise tax to provide highways, streets, and roads . . . ." Surely this very language indicates conclusively that the state excise tax on gasoline is a user tax; the purpose is obviously to tax highway users in *direct* proportion to their use of facilities.

This legislative intent is also indicated by the provision for refunds to users of gasoline for nonhighway purposes. Miss. Code Ann., § 27-55-23 (1972) provides:

> "Any person who shall purchase and use gasoline for agricultural, maritime, industrial, or domestic purposes, as defined in this article, which is not used in operating motor vehicles upon the highways of this state, shall be entitled to a refund of all but one cent per gallon of the tax actually paid on gasoline which is used for agricultural, maritime, industrial, domestic, or nonhighway purposes. . . ."

It is noteworthy that this refund is given *to the user* of the gasoline[11] and not to the collector of the taxes.

Miss. Code Ann., § 27-55-27 (1972) further strengthens petitioner's argument that the state excise tax falls upon the consumer. The statute provides for a refund for lost or destroyed gasoline. Obviously, the reason for the refund is that the legislature never intended to tax any gasoline, but that expended or used on its highways.

A further look at the Mississippi gasoline excise tax bolsters petitioner's position that the tax is on the consumer and is merely collected by the producer. Miss.

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11. As discussed previously, if the state excise tax is upon the retailer Gurley, then the refunding of Gurley's tax monies to consumers of gasoline for nonhighway purposes raises a serious constitutional question.

Code Ann. § 27-55-11 (1972) provides for the tax to be collected and paid to the State of Mississippi by the producers or distributors. The use of the term "collected" within the statute is certainly significant in regard to the legal incidence of the tax, for it implies that the distributor is merely an agent for collection of the tax.[12] It should also be noted that this section provides that the tax shall be collected and paid only once regardless of the number of transfers between the actual manufacturer and the consumer. Obviously, if the tax was upon the privilege of doing business, then each seller in the chain from manufacturer to consumer would have to pay the tax. Under the existing scheme, however, multiple taxing of distributors is not provided for as the tax is intended to be on the consumer and to allow a compounding of the tax upon distributor would not be in accord with a levy on the user.

In 1948 the Mississippi Supreme Court, basing its decision on the statutory refund provisions and on the logic espoused in *Panhandle*, held in *State* v. *Republic Oil Co.*, 202 Miss. 688, 32 So.2d 290 (1947), that:

> "The . . . tax is not upon the appellee [a distributor] or other distributors *either at wholesale or retail, but is upon the ultimate consumer; is a use tax for the use of the public highways by the consumer and is not to be collected for uses other than upon the public highways.* The retail dealer in selling to the consumer adds the [seven] cents to that which would otherwise be the price of the gasoline provided the gasoline is to be used on the public highways, and the retailer

12. The agency status of Gurley as a collector of taxes for the state is further evidenced by Miss. Code Ann. § 27-55-7 (1972) which provides that distributors (collectors of this tax) must register and post pond assuring proper collection and Miss. Code Ann., § 27-55-13 (1972) which provides that the collector must make monthly reports and remittances to the state of taxes collected.

remits the [seven] cents to the state, which, in turn, reimburses the wholesaler, such as appellee, who has already paid the tax in advance to the state." Id. at 692, 32 So.2d 294[13]. [Emphasis added].

In addition to the provisions already pointed out, which were present in the gasoline excise tax at the time of the *Republic Oil* case, there was from September 1, 1966 until January 1, 1970, the greater portion of the period involved in this refund suit, a provision in the MISS. CODE (Act of June 8, 1966, Ch. 645 (1966) Gen. Laws Miss. 1343) that "the tax levied by this section may be passed on to the ultimate consumer, and such consumer in ascertaining his net income for income tax purposes may deduct any such taxes he has actually paid. . . ."[14]

In summary, the legislative purpose in imposing a state excise tax was to provide for an equitable method to finance highway construction. The legislature accomplished that purpose by taxing the *consumer* in direct proportion to the amount of gasoline he uses on the highways. Therefore, it necessarily follows that the tax, in operation and effect, is imposed on the consumer; Gurley, as a retailer or distributor, merely acts as an agent for the collection of such taxes. Consequently, the excise tax is not on Gurley, but on the user of the gasoline. And, as noted

13. In its decision in the instant case, the Mississippi Supreme Court dismissed this language as mere dicta. 288 So.2d 868, 872 (Miss. 1974).

14. In ruling that Mississippi gasoline taxes are deductible by the consumer in computing his net income for federal income tax purposes and that the distributor should neither include in his gross income any gasoline tax collected by him nor deduct any amount remitted by him to the state, the chief counsel of the Bureau of Internal Revenue said, "This added language strengthens the conclusion that the tax is intended by the legislature to be imposed upon the ultimate consumer, and the decision in the *Republic Oil* case, *supra*, would apply a fortiori to the new statute." G.C.M. 25579; Cum. Bull. 1948-1, pp. 36, 38.

by the Court in *Panhandle*: "It is immaterial that the seller and not the purchaser is required to report and make payment to the state." 277 U.S. at 222.

C.

Judicial Authorities.

The following jurisdictions have determined that the state gasoline excise taxes are not to be included in the state sales tax base: *American Oil Co.* v. *Mahin,* 49 Ill.2d 199, 273 N.E.2d 818 (1971); *State of Georgia* v. *Thoni Oil Magic Benzol Gas Stations, Inc.,* 121 Ga. App. 454, 174 S.E.2d 224 (Ga. App. Ct. 1970), *aff'd,* 226 Ga. 883, 178 S.E.2d 173 (1970); *Kesbec, Inc.* v. *McGoldrick,* 16 N.E.2d 288, 278 N.Y. 293 (1938); *Kesbec, Inc.* v. *Taylor,* 2 N.Y.S.2d 241 (1938).

In the case of the *State of Georgia* v. *Thoni Oil Magic Benzol Gas Stations, Inc., supra,* the Georgia Supreme Court ruled that its state excise tax was not includable within the gross proceeds upon which the state sales tax was based. The court stated that the Georgia excise tax was a tax upon the ultimate consumer and not upon the seller and that such taxes are "added to the sales price" and, therefore, not includable within the tax base.

In the recent case of *American Oil Co.* v. *Mahin,* 49 Ill.2d 199, 273 N.E.2d 818 (1971), the Illinois Supreme Court held that the case law and aforementioned Illinois statutes supported their conclusion that the legal incidence of the motor fuel tax falls on the consumer of the motor fuel and not upon the distributor or retailer and, thus, that tax monies received by the retailer or distributor pursuant thereto should not be included in the base upon which the retailer's occupation and use taxes are computed. To support the conclusions that the tax was im-

posed upon the consumer and that the retailer or distributor acts only as a collection agent, the court noted the earlier case of *People* v. *Werner*, 364 Ill. 594, 5 N.E.2d 238 (1936), and stated that appellant there contended that he should not be required to pay the retailer's occupation tax on his sales of gasoline because he was paying the motor fuel tax upon the privilege of making the sale, and in deciding that issue the court held that the motor fuel tax was not imposed upon the taxpayer's privilege of selling gasoline and expressly reaffirmed the holding in the case of *People* v. *Kopman*, 358 Ill. 479, 193 N.E. 516 (1934), that the motor fuel tax law "makes the distributor the agent of the state as a collector of the tax."

The case of *American Oil Co.* v. *Mahin*, 49 Ill.2d 199, 273 N.E.2d 818 (1971), indicates that the nature of the state excise tax is that of a tax upon the consumer, which is collected by the seller as agent for the state. This is analogous to petitioner Gurley's position that the seller is the agent of the United States for collection of the federal excise tax on gasoline.

Consequently, just as the imposition of a state sales tax on the federal excise tax consitutes a violation of Gurley's due process and equal protection rights (Argument I), so too does the imposition of a state sales tax on the state gasoline excise tax. As stated by the Court in *Hoeper* v. *Tax Commissioner*, 284 U.S. 206 (1931):

> ". . . any attempt by a state to measure the tax on one person's property . . . by reference to the property . . . of another is contrary to due process of law as guaranteed by the 14th amendment." 284 U.S. at 208.

CONCLUSION

If the federal and state excise taxes attach upon the sale of gasoline, then the tax cannot come into existence until that sale. Since Gurley sells only to the ultimate consumer, the excise tax attaches simultaneously with the sale and with the sales tax; therefore, there can be no sales tax upon the excise tax.

Additionally, if the federal and state excise taxes are upon the consumer as use taxes, then Gurley is merely the collector and not the taxpayer. It is submitted that the *Panhandle* doctrine, which places the legal incidence of the excise tax on gasoline upon the consumer, is still viable and should be applied to the federal excise tax and to all state excise laws. Regardless of the language of each state statute, the fact still remains that the purpose of each tax is to equitably distribute the cost of highway construction to those persons who make use of the highways. No matter how state legislatures disguise the language of the statute, the substance and effect of each state excise tax law is—like the language, substance and effect of the federal statute—to tax the consumer on the sale of gasoline. Consequently, the distributor (Gurley) merely collects the tax for each government and, therefore, he is not the actual payer of the tax.

For the state to exact sales tax from Gurley as if he were the actual payer of either federal or state excise tax is to tax him on property which is not his, but rather that of the state or federal government—which results in the taking of petitioner's property without due process of law, in clear violation of the Fifth and Fourteenth Amendments of the United States Constitution. Furthermore, the discriminatory state taxation of Gurley where others similarly situated are not taxed, deprives the petitioner of equal pro-

tection under the law. Finally, a state tax on those monies held in trust by Gurley as agent for the United States is, in essence, a tax upon the United States itself, and, therefore, is clearly unconstitutional.

For these reasons, the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles R. Davis, one of the counsel for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of December, 1974, I served copies of the foregoing Brief for the Petitioner on all parties required to be served, by depositing a copy of said Brief for the Petitioner in the United States Post Office, properly addressed, with first class postage prepaid, to Senator William G. Burgin, Jr. and Mr. Hunter M. Gholson, at Post Office Box 32, Columbus, Mississippi 39701, and to Mr. James H. Haddock, 214 Woolfolk State Office Building, Jackson, Mississippi 39201, Counsel of record for the Respondent.

CHARLES R. DAVIS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1734

W. M. GURLEY, D/D/A GURLEY OIL COMPANY,

Petitioner

versus

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,

Respondent

BRIEF FOR THE RESPONDENT

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CITATIONS (continued)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

W. M. GURLEY, D/B/A)
GURLEY OIL COMPANY,)
Petitioner)
)
V.)NO. 73-1734
ARNY RHODEN, COMMISSIONER,)
CHAIRMAN OF THE STATE TAX)
COMMISSION FOR THE STATE OF)
MISSISSIPPI,)
Respondent)

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the Supreme Court of the State of Mississippi and the Chancery Court of the First Judicial District of Hinds County, Mississippi, are attached to the petition for Writ of Certiorari as appendices A and B, respectively.

JURISDICTION

The respondent accepts the statement of jurisdiction contained in the petitioner's brief.

CONSTITUTING AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions quoted in the petitioner's brief, respondent supplements the following:

1. Miss Code Ann., Section 27-65-3 (1972, provides as follows:

> Gross proceeds of sales means the value proceeding or accruing from the full sale price of tangible personal property including installation charges, carrying charges, or any other additions, to selling price on account of deferred payments by purchaser, without any deductions for freight, cost of property sold, other expenses or losses, or taxes of any kind except those expressly exempt by Miss. Code Ann. Section 27-65-29 (1972).

2. Miss. Code Ann., Section 27-65-13 (1972) provides as follows:

> There is hereby levied and assessed,and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

3. Miss. Code Ann., Section 27-65-17 (1972) provides as follows:

> Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed and shall be collected a tax equal to five per cent of the gross proceeds of the retail sales of the business, except as otherwise provided herein. . .

> Wholesale sales of beer, motor fuel, soft drinks and syrup shall be taxed at the rate of five per cent in lieu of the one-eighth of one per cent wholesale tax, and the retailer shall file a return and compute the retail tax on retail sales, but may take credit for the amount of the tax paid to the wholesaler on said return covering the subsequent sales of same property provided adequate invoices and records are maintained to substantiate the credit.

4. Miss Code Ann., Section 27-65-29 (1972) provides as follows:

> The tax levied by this chapter shall not apply to the following:
>
> (e) Taxes
>
> (1) Federal retailers' excise taxes, federal tax levied on income from transportation, telegraphic dispatches, telephone conversation and electric energy.
>
> (2) The State of Mississippi gasoline tax on gasoline sold by a distributor for nonhighway use which is refunded by the Motor Vehicle Comptroller.

QUESTIONS PRESENTED

1. Whether Excise Taxes imposed by 26 U.S.C. Section 4081 may be included in the sales tax base utilized by the State of Mississippi in computing taxable "gross proceeds of sales" for the collection of sales taxes?

2. Whether or not the refusal of the State of Mississippi to permit a

gasoline dealer to deduct an amount equal to the Federal Excise taxes collected from him on gasoline imported into Mississippi from the gross proceeds of sales, on which state sales tax computations are based, constitutes a violation of either (a) the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the United States Constitution; or (b) the Federal Governments constitutional immunity from taxation by a state?

3. Whether or not the refusal of the State of Mississippi to permit a gasoline dealer to deduct from the gross proceeds of sales, for purposes of computing Mississippi Sales Tax, an amount equal to the Mississippi gasoline excise taxes imposed upon such dealer, results in a deprivation of the gasoline dealer's property without due process of law under the Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Petitioner Gurley is in the business of importing, distributing and retailing gasoline, diesel fuel and related petroleum products, with principal offices in West Memphis, Arkansas, ownership of five retail service stations in Mississippi, and consignment sales operations through several Mississippi grocery stores. Petitioner obtained Mississippi Distributor's Permit No. 447 for gasoline, diesel fuel, kerosene or oil, and posted the necessary bond conditioned upon the full payment of all excise taxes levied on those fuels pursuant to Chapter 64, Mississippi

Laws of 1946, as amended. Petitioner is likewise qualified as a distributor of gasoline with, and pays federal excise tax to, the Internal Revenue Service. During the period pertaining to this petition, and pursuant to the authority of the permits and bonds described, petitioner purchased gasoline and fuel from producers in Arkansas and Tennessee and distributed that fuel for sale at Mississippi outlets.

On January 16, 1971, petitioner filed suit to recover sales taxes in the amount of Sixty-Two Thousand Seven Hundred Eighty-Two Dollars and Fifty-Seven Cents ($62,782.57) which he alleged were improperly collected by the State of Mississippi. The basis of petitioner's complaint was that the sales taxes were computed on a tax base which included State and Federal Excise taxes in addition to the base price of gasoline. Respondent herein cross-complained for the sales taxes not paid by petitioner.

It has been respondent's position throughout this controversy that both the State and Federal Excise taxes are legally imposed upon the distributor, that the distributor may, as a matter of business economics, raise the price charged his customers an amount sufficient to absorb his payment of the excise taxes, but that the legal incidence of both Federal and State Excise taxes is upon the distributor, and that such taxes may not be collected, if not paid by the distributor, from the consumer. It is respondent's position, therefore, that the amount of such taxes are no different from any other costs of the distributor's doing business, which are reflected in the price charged the ultimate consumer. Therefore, the distributor has no right to exclude an amount equal

to such excise taxes from the "gross proceeds of sales", on which sales taxes are computed.

The respondent has prevailed in both the Chancery Court of Hinds County, Mississippi, and in the appeal taken from that decision by petitioner to the Mississippi Supreme Court which, as petitioner has indicated, denied Mr. Gurley's petition for a rehearing.

SUMMARY OF ARGUMENT

I

THE APPLICABLE STATUTES PLACE THE LEGAL INCIDENCE OF BOTH THE UNITED STATES AND MISSISSIPPI GASOLINE EXCISE TAXES UPON THE DISTRIBUTOR AND NOT THE CONSUMER.

The basic argument which petitioner brings to this Court is that both Federal and State gasoline excise taxes are taxes upon the ultimate purchaser or consumer of gasoline, and therefore, should not be included in the sale price from which state sales taxes are computed.

The first point made by respondent is that the language of the applicable statutes, in themselves, show that the excise taxes are legally placed upon the distributor or producer and not upon the seller or consumer.

The applicable Federal statute is Title 26, Chap. 32, United States Code, Sec. 4081 and the succeeding sections.

In answer to the contention of petitioner that legislative intent was to tax the consumer, respondent quotes the reply to that same argument contained in the opinion of the Illinois Supreme Court in Martin Oil Service, Inc. v. Illinois Department of Revenue, 49 Ill. 2d 260, 273 N. E. 2d 823, cert. denied, 405 U. S. 923 (1971).

Respondent believes that the authorities therein clearly overcome the references urged by petitioner as indicating legislative intent that the Federal statute be considered a tax upon the consumer.

We argue, as has been found both by the Illinois and Mississippi Courts, among others, that the excise tax places no liability on the purchaser-consumer if it is not remitted by the producer and that it is totally illogical to argue that the legal incidence of the tax is on one person while only another can be called upon to pay it.

The Mississippi statute in question is Miss. Code Ann. Section 27-55-11 (1972) which, by its very language, places the excise tax upon the privilege of the distributor who imports it into Mississippi at the time when, and at the point where, such gasoline enters the state.

The administration of this law was described by a witness in the trial court. He said that the Mississippi State Tax Commission collects the tax from the producer or importer without reference to what use, if any, he may later make of it.

Thus, the importer or distributor is liable for the tax long prior to any sale he may make to a consumer, and the fact that he may increase his price to the consumer because of his liability to pay the excise tax is merely one of many of his costs which are reflected in the ultimate price.

II

THE DECISION OF THE MISSISSIPPI SUPREME COURT IN THIS CASE IS IN ACCORD WITH THE APPLICABLE PRECEDENTS OF THE SUPREME COURT OF THE UNITED STATES.

In this point respondent discusses the various decisions of this Court which have announced rules of law applicable to the case at bar.

Lash's Products Co. v. United States, 278 U.S. 175, 49 S.Ct. 100 73 L.Ed. 251 (1929), held that a tax upon the manufacturer of soft drinks equivalent to 10% of the price for which the drinks were sold is a tax laid and remaining on the manufacturer and on him alone. In that case a unanimous Court held that phrase "pass the tax on" is inaccurate and that the purchaser does not pay the tax although he may pay more for the goods because of the tax.

The Court then decided Wheeler Lumber Co. v. U. S., 281 U. S. 572, 5 S.Ct. 419, 74 L. Ed. 1074 (1930), in which federal tax on the transportation of lumber, which in that case was sold to counties, did not constitute a tax upon the immune consumer but a tax only on the non-exempt seller, again emphasizing that the economic burden does not determine the legal incidence of the tax.

In 1931 this Court decided Indian Motorcycle Company v. United States, 283 U.S. 570, 51 S.Ct. 601, 15 L.Ed. 1277,(1931) which is cited by petitioner in support of his position here. That case held that a federal tax on the manufacture or import and sale of motorcycles could not be collected from a city purchasing such a motorcycle because it was a tax upon the sale itself. This decision was that of a divided Supreme Court in which the dissenting opinion thought the decision violative of the principle announced in the earlier two cases cited above.

Another case of the same era, also relied upon heavily by petitioner here, is Panhandle Oil Company v. State of

Mississippi, ex rel. Knox, 277 U. S. 218, 48 S.Ct. 451, 72 L. Ed. 857, 56 A.L.R. 583 (1928), which was a case holding that the State of Mississippi could not collect sales taxes on gasoline sold to the United States Coast Guard because such sales taxes were imposed directly on the purchaser and in that case the United States, as purchaser, was exempt. This also was a split decision, 4 to 3, with a strong dissent by Mr. Justice Holmes.

In 1941 Alabama v. King and Boozer, 314 U. S. 162, 62 S. Ct. 43, 86 L. Ed. 1, held that an Alabama sales tax imposed upon contractors who built governmental facilities on a cost plus-fixed-fee basis was properly collected and did not infringe upon federal immunity. The rationale was that such tax was on the contractor and not upon the United States as his customer. In the opinion in this case, the Court specifically held that insofar as the Panhandle Oil Company opinion expressed a different view, the Court held that view no longer tenable.

The respondent submits that this is the critical point here: If the legal incidence is upon the producer or distributor, then such distributor has no right to deduct an amount equivalent to these taxes from the sales price on which sales taxes are computed.

Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110, 74 S.Ct. 403, 98 L. Ed. 546 (1954), does not, as claimed by petitioner, reaffirm the Panhandle decision. It, in fact, does not mention it and only holds that Arkansas Sales Taxes cannot be imposed

on the sale of tractors which are used for and ultimately owned by the United States.

We submit, as held by the Mississippi Court in this case, that King and Boozer is the United States Supreme Court case which enunciates the doctrine best applied to the factual situation here under consideration.

III

DECISIONS OF OTHER STATE AND FEDERAL COURTS ARE PERSUASIVE THAT THE EXCISE TAXES IN QUESTION ARE UPON THE DISTRIBUTOR AND NOT THE CONSUMER.

This case is before the Supreme Court of the United States on Writ of Certiorari because there is a division of authority among the states on the very question of interpretation of the Federal Excise Tax statutes and certain state excise tax statutes which are presented in this review.

While Michigan and Indiana have construed the Federal excise tax as imposed upon the consumer, a number of other state courts have adopted the contrary position, as argued by respondent here.

The Mississippi decision relied heavily upon Martin Oil Service, Inc. v. Illinois Department of Revenue, supra, decided in 1971 on which certiorari was denied by this Court in 1972. The factual and legal matters considered in that case were virtually identical to the case at bar. Significant portions of the Martin opinion are quoted in the respondent's brief here because of their complete applicability to the instant problem.

New Jersey adopted the same position in 1973 in Ferrara v. Director, Division of Taxation, 2 CCH State Tax Reports, N. J. Para. 200-583 (1973).

Georgia adopted this position in State of Georgia v. Thoni Oil Magic Benzol Gas Stations, Inc., 121 Ga. App. 454, 174 S.E. 2d 224 (Ga. App. Ct.) aff'd. 226 Ga. 883, 178 S.E. 2d 173 (1970), while at the same time holding that because of the particular language of the Georgia State statute, their state excise taxes could not be included in base price for sales tax computation, even though the Federal excise taxes could.

Other state Supreme Court decisions adopting the view advanced by the respondent here are cited from Indiana and Alabama.

There are also federal authorities supporting this view. United States v. Sharp, Motor Vehicle Comptroller, 302 F. Supp. 668 (S.D. Miss.1969), was a case decided by a three-judge constitutional court directly holding that the Mississippi Excise or Privilege tax imposed on gasoline dealers is a tax on the distributor and not the consumer and that, even though the economic burden may have fallen upon the Federal Government, it was not entitled to immunity because it was not the taxpayer.

That case cited and relied upon previous opinions of the Comptroller General of the United States to the same effect.

The Sharp case also relies upon the King and Boozer doctrine of the Supreme Court of the United States.

We believe that the petitioner's contention that the distributor collects

and holds such taxes for remittance to the government as a trustee is undermined by the fact that the distributor has an unequivocal obligation to pay them whether or not he collects them from the ultimate consumer; that no liability for non-payment is ever upon the consumer and that the taxing authorities stand as any other creditor of the distributor, and not as the beneficiary of any fiduciary position.

This lack of fiduciary preference was decided by a federal district court in Louisiana in a 1940 decision holding that no special lien existed for the collection of such excise taxes but that the bond and penal provisions were intended to prevent the loss of the tax.

The Ninth Circuit has adopted the same interpretation of such excise taxes as that of the respondent here in the case of Martin's Auto Trimming, Inc. v. Riddell, 283 F. 2d 503 9th C. A. 1960). The Seventh Circuit has likewise adopted the same position in a 1971 case.

A.L.R. annotations are also cited which compile numbers of cases frcm many jurisdictions on this question. Respondent submits that the preponderance of the factually applicable cases support the affirmation of the decision of the Mississippi Supreme Court.

IV

MISSISSIPPI'S DETERMINATION OF THE LEGAL INCIDENCE OF ITS OWN EXCISE TAX SHOULD BE ACCEPTED AS FINAL BY THE SUPREME COURT OF THE UNITED STATES UNDER ITS PRIOR CASE LAW.

The rationale for this point derives from the language found in the King and Boozer opinion which detailed that the definition of purchaser within the meaning of the state statute was a question of state law on which only the Supreme Court of Alabama could speak with final authority.

Subsequent decisions of this Court have held: (a) That the determination of the highest court of a state is controlling upon the question as to whether the legal incidence of a tax imposed by state law is upon the vendor or vendee; (b) That Federal Courts may examine the taxing schemes to determine the incidence of tax only for the limited purpose of determining whether the tax affects federal immunity; (c) That even when the constitutional validity of the state scheme is in question, Federal Courts are obligated to give state determinations great effect in their consideration; and (d) That when a state court has made its own definitive determination as to incidence, it will be deemed conclusive if it is a reasonable interpretation of the statute.

Petitioner has cited no factually applicable case to support any assertion that the federal judiciary should set aside the state court's interpretation of the state statute.

It follows that if the state court determination was reasonable, and within its purview, there can be no violation of the constitution of the United States as claimed by the petitioner.

ARGUMENT

POINT 1

THE APPLICABLE STATUTES PLACE THE LEGAL INCIDENCE OF BOTH THE UNITED STATES AND MISSISSIPPI GASOLINE EXCISE TAXES UPON THE DISTRIBUTOR AND NOT THE CONSUMER.

The petitioner in this case vigorously argues, and virtually assumes, that it is the consumer and not the producer upon whom these taxes are placed.

Respondent believes that this court has consistently, except for a brief period of its judicial history, adhered to the rule that the legal incidence of taxes and not the economic burden would guide the Court in determining questions arising from the imposition of taxes.

Before examining, in detail, the cases decided by the United States Supreme Court, which bear upon this question, and persuasive decisions of inferior Federal Courts and State Courts, we would propose to consider the language of the applicable statutes themselves. They are corectly quoted in the constitutional and statutory provisions set forth in petitioner's brief.

Title 26, Chapter 32, United States Code, Section 4081 appears in a chapter entitled, "Manufacturers Excise Taxes," and states:

> There is hereby imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ a gallon.

The petitioner in Point I A. of his

argument correctly quotes the succeeding Code Section in which the tax is imposed upon any person who comes into its possession tax-free, such person being defined by the statute as a "producer" for purposes of such tax liability.

There is no doubt that, by virtue of the definitions of the statute, the petitioner, Mr. Gurley, is such a "producer".

The statute makes no reference to the ultimate retail purchaser or consumer, except the provision that requires the producer to pay the tax on gasoline owned by him tax free, even if he uses it himself instead of selling it. 26 U.S.C., Section 4082(c)

The respondent believes that it is unnecessary and inappropriate to resort to any extraneous guidelines for the interpretation of the legal incidence of the tax imposed by this statute for the reason that the language of the statute is clear and unambiguous in itself. The tax liability is simply placed upon the producer, i.e., petitioner, W. M. Gurley.

The petitioner urges in Point I C. of his brief that both the President and the Congress of the United States have indicated an intention to consider this tax as a user tax, placed upon the consumer or retail purchaser. The precise references urged upon this Court, to indicate such legislative intent, were urged upon the Illinois Supreme Court in Martin Oil Service, Inc. v. Illinois Department of Revenue, 49 Ill. 2d 260, 273 NE 2d 823, Cert. denied 405 US 923 (1971). To this contention the Illinois Court responded as follows:

> It is urged by Martin that certain congressional references to the

gasoline tax show it must be considered a tax whose incidence rests on the consumer. Exemplary of these is the President's Message to Congress May 17, 1965, Report of the House Ways and Means Committee on H. B. 8371 89th Congress First Session (1965) at 1070-71, in which President Johnson said: "reform of the excise tax structure will leave * * * excises on alcoholic beverages, tobacco, gasoline, tires, trucks, air transportation (and a few other user charges and special excises) * * *." (H. R. Doc. No. 173, 89th Cong., 1st Sess. 3 (1965).) We consider the references to the tax as a "user tax" were not intended to be descriptive of the legal incidence of the gasoline tax. It is not disputed that the ultimate economic burden of the tax rests upon the purchaser-consumer. A practical, nontechnical description of the tax as a "user tax' is explainable, consistently with the legal incidence of the tax being on the producer. The economic burden of the tax has no relevance to the issue before us. <u>Fischman & Sons, Inc. v. Department of Revenue</u>, 12 Ill. 2d 253.

So far as the Federal legislative intendment is concerned, it is relevant to notice that a reference of greater and persuasive significance to the incidence of the tax is found in Senate Report No. 367, a report of the Committee of Finance relative to the Federal-Aid Highway Act of 1961. (U. S. Code Congressional and Administrative News, vol. 2, 87th

> Congress, 1st Session, 1961.) The report, which contains a recommendation by the committee that the gasoline tax be continued at the rate of four cents per gallon, states: "Under present law the Federal tax on gasoline is imposed on the producer, importer or wholesaler distributor of the gasoline and is payable shortly after he makes its sale."

It is noted that, in the opinion from which this Writ of Certiorari arose, the Mississippi Supreme Court endorsed and adopted the reasoning of the Illinois Court in the Martin case, supra, and quoted with approval, among other portions of the decision, the following paragraph illustrating the Illinois Court's conclusion that the incidence of the Federal Excise tax fell on the producer rather than the consumer-purchaser:

> The validity of this view can be illustrated by the consideration that if the tax is not paid by the producer he is the only one from whom the government may seek to collect the tax. Significantly, the statute does not impose any liability on the purchaser-consumer if the gasoline tax is not remitted by the producer. It is irreconcilable to say that the legal incidence of the tax is on the consumer-purchaser and to say that he is not liable for the tax period. 49 Ill. 2d at 263, 273 NE 2d at 826 quoted in appendix A to the petition for the Writ of Certiorari at page 30 and may be found at 288 So. 2d at 873.

With respect to the Mississippi gasoline

excise tax, its statute is even more explicit in the language used to place the legal incidence of the tax upon the producer (distributor) and not upon the ultimate purchaser or consumer.

Section 27-55-11 of the Mississippi Code of 1972 clearly sets forth the tax liability of those persons such as petitioner who engage in the business of bringing gasoline into Mississippi for resale by them or others:

> Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor, an excise tax equal to eight cents per gallon all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose. . .
>
> With respect to distributors or other persons who bring, ship, have transported, or have brought into this state gasoline by means other than through a common carrier, the tax accrues and the tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when, and at the point where, such gasoline is brought into the state.

Other states' statutes interpreted by State and Federal cases, discussed later in this brief and in the petitioner's brief,

expressly provide for the excise tax to be passed along to the ultimate user of the fuel. Obviously, no such provision exists in the Mississippi Law, and while the distributor on whom the incidence of the tax rests, may pass the tax along by increasing the price for which he sells the gasoline, he is certainly not legally required to do so.

In fact, as shown by the testimony in the trial court in this cause of Joe Sharp, the Mississippi official charged with the duty of administering and collecting these taxes, tax liability attaches to the distributor or importer at the time the gasoline enters the State of Mississippi. It is immaterial to Mississippi whether, after paying the tax, the distributor sells the gasoline, gives it away, pours it on the ground, or sells it to a retailer or directly to an ultimate consumer (Appendix 72-76).

On January 1, 1970, an amendment became effective by which the provision in the Mississippi statute that had theretofore permitted a gasoline distributor to pass along the tax when he sold the gasoline was removed from the law.

Petitioner cites Mississippi Code Annotated, Section 27-55-27 (1972), at page 42 of its brief, and quotes a pertinent part thereof on pages 9 and 10. Certainly, this section makes available a refund to the owner of any sizeable quantity of gasoline, upon which the Mississippi Excise tax has been paid, in the event that gasoline is lost or destroyed through some catastrophe. The respondent fails to see how such refund provisions strengthen the petitioner's argument, as claimed in his brief. The respondent believes this section merely provides tax relief so that one, who sustained a loss, could,

at least, recover the excise tax which constituted a part of the economic cost of the gasoline lost by the claimant.

Certainly, any argument that the state gasoline excise taxes and the state sales taxes are duplicate taxes imposed at the same time must be defeated by the plain statutory language of Mississippi Code Annotated 27-55-11 (1972) which states:

> The tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when and at the point where such gasoline is brought into the state.

Obviously, the distributor is liable for the tax before he places it in the service station's distribution tank, and if he adds an amount equivalent to the tax for which he is already liable, to the base price of the gasoline before selling it to his customer, he does so by increasing the gross sale price on which he is required by Mississippi Code Annotated Section 27-65-3 (g) (1972) to compute, collect and remit sales taxes.

POINT 2

THE DECISION OF THE MISSISSIPPI SUPREME COURT IN THIS CASE IS IN ACCORD WITH THE APPLICABLE PRECEDENTS OF THE SUPREME COURT OF THE UNITED STATES.

The petitioner has advanced several previous decisions of the Supreme Court of the United States which, he contends, support his argument that the ultimate consumer should be construed to be the taxpayer on whom the excise taxes are levied; and accordingly, that the judgment of the Supreme Court of

Mississippi should be reversed.

The respondent urges consideration of a number of other United States Supreme Court decisions, as well as those cited by petitioner, to bring into perspective the body of case law laid down by this Court which applies to the present question.

We would first cite Lash's Products Co. v. United States, 278 U.S.175,49 S.Ct.100 73 L.Ed.251(1929) which was a suit to recover the amount of certain taxes imposed on soft drinks sold by the manufacturer equivalent to 10% of the price for which sold. The tax, in this case, was paid by the petitioner, calculated at 10% of the sum actually received, but the petitioner had notified its customers beforehand that it paid the 10% tax and contended, that in this way, it passed the tax on so that the true price of the goods was the sum received, less the amount of the tax.

Mr. Justice Holmes, speaking for a unanimous court, held:

> The phrase "pass the tax on" is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. . . the purchaser does not pay the tax. He pays, or may pay, the seller more for the goods because of the seller's obligation, but that is all. . .
>
> The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore, it is part of the price. . .

This Court next considered an imposition

of tax question in <u>Indian Motorcycle Company v. United States</u>, 283 U. S. 570, 51 S. Ct. 601, 15 L. Ed. 1277 (1931), which is one of the two cases cited by petitioner, at page 20 of his brief, which, he says, support the line of state court decisions contrary to the Mississippi decision now under consideration.

In the <u>Indian Motorcycle Company</u> case, supra, a Federal tax on the manufacture or import and sale of motorcycles was collected from a city purchasing such a motorcycle.

A divided Supreme Court held the imposition of the tax in that case a void, unconstitutional imposition of a Federal tax upon a municipal government.

It was argued, in the dissenting opinion, that the decision did violence to the principle announced in <u>Lash's Products Company v. United States</u>, supra, as well as the law of the case in <u>Wheeler Lumber Company v. U. S.</u>, 281 U. S. 572, 5 S.Ct. 419, 74 L. Ed. 1074 (1930). The majority in the <u>Indian Motorcycle Company</u> case, supra, cited <u>Panhandle Oil Company v. State of Mississippi ex rel. Knox</u>, 277 U. S. 218, 48 S.Ct. 451, 72 L. Ed. 857, 56 A.L.R. 583 (1928), the other case cited and relied upon by petitioner as authority of the Supreme Court supporting the petitioner's position.

<u>Panhandle Oil Company</u> case, supra, was a narrowly defined case, simply holding that the State of Mississippi could not legally collect sales taxes on gasoline sold to the United States Coast Guard and other branches of the United States of America. This case dealt with the direct imposition of sales taxes by a state to be collected from the United States, as purchaser. As pointed out by the Mississippi Supreme Court in the opinion now being

considered by this Court, the Panhandle case was a 4-3 decision in which Mr. Justice Holmes wrote a strong dissent asserting that the legal incidence of the tax was on the seller.

An incidence of tax question was next considered by the United States Supreme Court in Alabama v. King and Boozer, 314 U. S. 1, 62 S.Ct. 43, 86 L. Ed. 1 (1941). This was a case arising from sales tax imposed by Alabama upon contractors who built government facilities for the United States on a cost plus fixed fee contract. The precise question presented was whether such tax which the seller was required to collect from the buyer infringed any constitutional immunity of the United States from state taxation. This Court held that the tax was not unconstitutional because its legal incidence was on the contractor and not upon the United States as his customer. In this case, Mr. Justice Stone, one of the dissenting Justices in Panhandle, said for the majority:

> The asserted right of one to be free of taxation by the other (government against state) does not spell immunity from paying the added cost attributable to the taxation of those who furnish supplies to the government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Company v. Mississippi (supra) and Graves v. Texas Company, 298 U. S. 393, 56 S.Ct. 818, 80 L. Ed. 1236, we hold it no longer tenable. 314 U. S. at 9, 62 S.Ct. at 45, 86 L. Ed. at 6.

The petitioner maintains that King and Boozer, supra, did not overrule Panhandle,

apparently despite Mr. Justice Stone's statement in the opinion, and he contends that it only explained that when the economic and not the legal incidence of a tax fell upon the United States the tax did not violate the Federal Government's immunity from state taxation. This is the very point at issue here: If the legal incidence is upon the producer or distributor to pay the excise taxes, state or federal, does the fact that an equivalent amount is added to the price and the economic burden, thus born by the ultimate consumer, affect whether or not the amount of such tax must be broken out and deducted from gross sales price, for purposes of computing sales taxes. If Alabama v. King and Boozer, supra, held, as we believe it clearly did, that question arising from tax liability will be determined by the legal incidence and not the economic burden of such taxes, and petitioner recognizes this, then this Supreme Court case is very important authority for respondent's position and for affirming the Mississippi Supreme Court in this case.

Another older decision of this court, worthy of mention, is the second case cited in the dissent in the Indian Motorcycle Company case, Wheeler Lumber Company v. United States, supra, a 1930 decision. In that case a tax was imposed on the transportation of lumber under a Federal revenue act of 1917. It was contended that lumber which was sold to a county should be exempt from the imposition of that tax because of the state immunity from federal taxation. There the United States Supreme Court held:

> The tax is not laid on the sale nor because of the sale. It is laid on the transportation and is measured by the transportation charges. True,

> it appears that here the transportation was had with a view to a definite sale; but the fact remains that the transportation was not part of the sale but preliminary to it and wholly the vendor's affair. It follows that the tax on the transportation cannot be regarded as a tax or burden on the sale. As the tax is not laid on the sale or in any wise measured by it, the case of Panhandle Oil Company v.Mississippi . . . is not in point. 281 U. S. 572 at 579, 50 S.Ct. 419 at 421.

We submit that the preliminary tax upon transportation of lumber is entirely analogous to excise tax upon the importation of gasoline into Mississippi, preliminary to its sale.

A subsequent case is advanced by petitioner, that of Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110, 74 S.Ct. 403, 98 L. Ed. 546 (1954). In that case Arkansas sales tax were imposed on tractors which were purchased by a contractor for the use and ultimate ownership of the United States so that the United States was the true purchaser on whom both legal and economic incidence of the tax fell. It was, of course, held that such tax is not collectible from an immune federal government. The petitioner has asserted throughout this litigation Kern-Limerick, supra, "reaffirmed the Panhandle decision" (petitioner's brief page 23).

On the contrary, we believe that Judge Rogers writing for the Mississippi Court in the opinion here under attack, was eminently correct in response to the contention of petitioner:

Contrary to appellant's assertions, the Kern-Limerick case does not specifically cite Panhandle in support of its decision, nor does it seem to change the effect of the King and Boozer decision. The reason the Court reached a different result in Kern-Limerick was that it found that the economic burden and the legal incidence of the tax fell on the United States, whereas in King and Boozer, the Court found that although the economic burden of the tax was on the United States, the legal incidence of the tax fell on the contractor.

Therefore, the appellant's contention that the Panhandle case was revived by Kern-Limerick must fail, since the Court still holds that where only the economic burden (and not the legal incidence) of a tax falls on the United States, the doctrine of sovereign immunity is not applicable. (appendix A to petition for Certiorari page 28; 288 So. 2d at 872).

POINT 3

DECISIONS OF OTHER STATE AND FEDERAL COURTS ARE PERSUASIVE THAT THE EXCISE TAXES IN QUESTION ARE UPON THE DISTRIBUTOR AND NOT THE CONSUMER.

It is recognized that a number of state excise taxes have been construed by state courts to be taxes upon the consumer and thus, not includible in the sales tax base and that some state courts have construed the federal excise tax likewise. Other state and federal courts have construed the federal excise tax, and state excise taxes, as legally imposed upon the distributor and thus, not deductible from the sales tax base as did Mississippi in this case. It is this conflict of authority, obviously, which has brought this question to this Court.

The respondent recognizes that the Michigan and Indiana courts have construed the federal excise tax as imposed upon the consumer as set forth in Point I B. of the petitioner's brief (pages 28-29).

On the contrary a number of other state courts, in decisions which we recommend as well reasoned, have to the contrary adopted the position taken by the respondent in this case.

Mississippi relied heavily upon Martin Oil Service, Inc. v. Illinois Department of Revenue, supra, which was decided by the Illinois Supreme Court in 1971 and on which Certiorari was denied by this Court in 1972. In that case, Martin operated 2 wholesale and 43 retail gasoline outlets in Illinois. He was licensed by the United States for payment of the federal excise tax, just as Gurley is licensed for that purpose. He

contended that the federal gasoline tax should not be included in gross receipts for the purpose of computing the Illinois Retailers Occupation tax which corresponds to Mississippi Sales tax, alleging the legal incidence of the federal tax was on the consumer-purchaser. Because of the similarity of the facts and the importance which both the respondent and the Mississippi Court have placed upon the Martin case, we quote at length from its opinion, regarding the incidence of the federal gasoline excise tax:

> This question appeared before this Court in 1936, when in People v. Werner, 364 Ill. 594, it was said that the legal incidence of the Federal gasoline·tax rested on the producer. Martin, to avoid the force of Werner, argues that the legal incidence of the tax was there stipulated by the parties. It is true that Werner was decided on a stipulation of facts. We cannot find however, any suggestion that the question of the legal incidence of the tax was part of the stipulation. Rather it seems clear that this Court's expression that the legal incidence of the tax rests on the producer was based on its analysis of the Federal statute.
>
> As Martin points out at least one jurisdiction has taken a position opposed to Werner. The Supreme Court of Pennsylvania in Tax Review Board v. Esso Standard Division of Humble Oil and Refining Co., 424 Pa. 335, 227 A. 2d 657,cert. denied, 389 U.S. 824, 19 L. Ed. 79, held that the legal incidence of the tax is on the purchaser-consumer. Decisions of two other States are read by Martin as supporting its thesis that the tax incidence

is on the purchaser-consumer. It was held in Standard Oil v. State (1937), 283 Mich. 85, 276 N. W. 908, and Standard Oil Co. v. State Tax Commissioner (1941), 71 N.D. 146, 299 N. W. 447, that on sales from producer retailers to consumers the Federal gasoline and State sales taxes were taxes that were to be simultaneously imposed. Those Courts concluded from this that the Federal tax should not be included in the "gross receipts" for the purpose of computing the State tax. Neither case considered the question of on whom the legal incidence of the Federal tax falls. We would observe that other Courts have reached the same conclusion this Court did in Werner. It was held in Sun Oil Co. Gross Income Tax Division, 238 Ind. 111, 149 N.E. 2d 115, by the Supreme Court of Indiana and in State v. Thoni Oil Magic Benzol Gas Stations, Inc., 121 Ga. App. 454, 174 S.E. 2d 224, aff'd 226 Ga. 883, 178 S.E. 2d 173, by the appellate court of Georgia that the legal incidence of the Federal tax rests upon the producer. The Supreme Court of Indiana relied importantly on People v. Werner, in its determination. We consider after reviewing these cases that Werner correctly judged that the incidence rests on the producer. The validity of this view can be illustrated by the consideration that if the tax is not paid by the producer, he is the only one from whom the government may seek to collect the tax. Significantly the statute does not impose any liability on the purchaser-consumer if the gasoline tax is not remitted by the producer. It is irreconcilable to say that the legal incidence of the tax is on the consumer-

> purchaser and to say that he is not liable for the tax. Referring to our decision in American Oil Co. v. Mahin, No. 43376, where we held that the incidence of the Illinois Motor Fuel Tax is on the consumer, we note that the statute there examined provides that the tax may be recovered from the consumer-purchaser if it has not been collected by the retailer.

Martin then contended as does Gurley in the instant case that because certain consumers of gasoline can secure refunds or credit for gasoline tax paid, the incidence of the tax was upon the consumer-purchaser rather than upon the producer-distributor. The Illinois Court disposed of this contention as follows:

> Another contention of Martin is that because amendments to the gasoline statute provide that certain consumers of gasoline can secure refunds of the gasoline tax paid, it must have been the legislative intent that the consumer-purchaser would bear the legal incidence of the tax. It is pointed out that in Chicago Motor Club v. Kinney, 329 Ill. 120, the Court said that a tax refund to a person who has not directly or indirectly paid the tax would be unconstitutional, and thus, Martin argues, as certain consumers can secure a refund, the incidence of the tax must be on the consumer-purchaser.
>
> We consider that the argument has only superficial validity when measured against the very convincing evidence of a contrary legislative intention, including the statement of the Committee on Finance that the Federal gasoline

tax was imposed "on the producer, importer, or wholesale distributor of the gasoline". The amendments upon which Martin relies provide that the purchaser-consumer can obtain payment in full of the Federal gasoline tax, that is, four cents per gallon, if the gasoline has been used on a farm for farming purposes (26 U. S. C. Sec. 6420 (a) and half of the tax payment, that is, two cents a gallon, if the gasoline has been used for other non-highway purposes (26 U. S. C. Sec. 6421 (a) or by the local transit systems (26 U. S. C. Sec. 6421 (b).

We consider that these payments by the Federal government are not refunds in a technical sense but rather allowances to certain consumer-purchasers based on a recognition that the economic burden of the gasoline tax falls on the ultimate consumer. The gasoline tax proceeds are used to provide Federal finances for highway support.

Petitioner's argument in the instant case adopted Martin's second major contention in toto to the effect that if the legal incidence of the tax should be on the producer rather than the consumer, sales made to consumers by one who is a producer-retailer, as is petitioner and as was Martin, should be distinguished from sales made by one who is simply a retailer, and sales by the producer-retailer should be exempt from sales tax. Martin cited Standard Oil v. State, supra, and Standard Oil Company v. State Tax Commissioner, supra, as does petitioner. The Illinois Court disposed of this contention with the following reasoning which we believe valid and sound:

In Standard Oil Co. v. State, 283 Mich. 85, 276 N. W. 908 and Standard Oil Co. v. State Tax Commissioner, 71 N. D. 146, 299 N. W. 447, Michigan and North Dakota adopted the position Martin would have us take. As expressed by the Supreme Court of Michigan the rationale of this position is that since the two taxes attach simultaneously, the Federal gasoline tax should not be considered a part of the sales price but as a fund which is payable by the producer to the Federal government.

The Department's response is that if Martin's argument is accepted it would result in the Federal tax of four cents per gallon being included in the computation of the Illinois tax on sales by retailers who are not also producers and excluded in the case of producer-retailers. This would typically result in the cost of gasoline to a consumer who purchases from a non-producer retailer being greater than to one who purchases from a producer-retailer and would economically discriminate against non-producer retailers. It would violate, argues the Department, the Illinois constitution and the equal protection clause of the United States constitution.

The retailers occupation tax in Illinois is imposed on a retailer's "gross receipts" (Ill. Rev. Stat. 1969, Ch. 120, Par. 441). "Gross Receipts" are the "total selling price" or the "amount of such sales". (Ill. Rev. Stat. 1969, Ch. 120, Par. 440) "Selling price" or "amount of sale" is defined as the "consideration for a sale". (Ill. Rev. Stat. 1969, Ch. 120, Par. 440).

The question therefore is whether when the producer-retailer passes on the cost to him of the Federal gasoline tax in the form of a higher price to the consumer, the amount by which the price is thus raised to compensate the producer-retailer can be said to be part of the consideration he receives upon the sale of the gasoline.

. . .The legal incidence of the Federal gasoline tax is on the producer, who is under no legal duty to pass the burden of the tax on to the consumer. If he does pass on the burden of the tax it is simply done by charging the consumer a higher price. This higher price is the result of the added cost, because of the burden of the Federal tax, to the producer in selling his gasoline. It is not different from other costs he incurs in bringing his product to market, including the costs of raw material, its processing and its delivery. All these costs are includable in his "gross receipts," or the consideration" he receives for his gasoline.

No reason has been given by Martin why the cost of the gasoline tax should be regarded differently from the other costs of the producer-retailer and we perceive none.

New Jersey has recently adopted the same position with respect to Federal excise taxes in the case of Jerry M. Ferrara v. Director, Division of Taxation, 2 CCH State Tax Reports, N. J., Para. 200-582 (1973). In dealing with this precise question, the New Jersey Court said:

The petitioner contends that for the

State to include as "gross receipts" the State and Federal Excise tax is arbitrary, oppressive and illegal. The issue is further narrowed to the determination of upon whom the legislature and congress imposed the respective taxes. If the aforesaid excise taxes are imposed upon the consumer, and the retailer and distributor is merely a "collector" for the respective governments involved, then the excise taxes collected should not be included in the gross receipts.

However, if the taxes are imposed on the retailer or distributor, then the entire price paid by the ultimate consumer,including all excise taxes paid, should be included in the petitioner's "gross receipts.". . .

The Federal statute clearly and unambiguously imposes the tax on the producer (which includes distributor) of the gasoline and not on the ultimate consumer. Liability for the payment of the tax rests solely upon the producer and nowhere is there any provision for any liability upon the ultimate consumer for the producer's failure to pay the tax.

The fact that the amount of the tax is added to the selling price and ultimately paid for the final purchaser does not constitute the latter as the taxpayer.

All taxes in effect are paid for by the ultimate consumer, but this does not mean the consumer is personally liable for the tax or is the taxpayer.

> All producers, manufacturers, distributors, and retailers are subjected to taxes of one form or another, including real estate and personal property taxes, which are calculated in their costs and added to the purchase price and "passed on" to the ultimate consumer. However, the words "passed on" are technically inaccurate in that the legal incidence of the aforesaid taxes are not on the consumer and he is not personally liable for the payment of said taxes. . . .
>
> Accordingly, it is the conclusion of this Division that the Federal Excise tax should be included in the gross receipts of the petitioner.

The New Jersey Court went on to make the same decision with respect to New Jersey motor fuels tax (a state excise tax).

A ruling to the same effect with respect to the Federal excise tax, and interestingly illustrative of statutory distinctions in the state excise taxes, is the case of State of Georgia v. Thoni Oil Magic Benzol Gas Stations, Inc., 121 Ga. App. 454, 174 S. E. 2d 224 (1970) aff'd 226 Ga. 883, 178 S. E. 2d 173 (1970). It was held in that case that the Federal tax is imposed on gasoline sold by the producer, and is not imposed on the sale made to the consumer. Thus, a gasoline dealer in calculating his sales tax must include as a part of the retail selling price the amount of the Federal excise tax. The Georgia Court held, however, that the amount of the Georgia motor fuel tax need not be included in the retail sales price base since this tax is imposed upon the sale to the consumer. The Georgia Court said there is no prohibition against absorption of the Federal excise tax by the seller but there is a prohibition

against absorption of the state imposed tax.

This case supports the respondent's position regarding the Federal excise tax in this case and, by inference, the Mississippi and Illinois position with respect to state excise taxes since they, unlike the Georgia tax, are placed upon the producer-distributor and not required to be collected from the consumer as in Georgia.

Other state court decisions holding that the legal incidence of such gasoline excise taxes is on the distributor and therefore, includible in the base for sales tax purposes, include Sun Oil Co. v. Gross Income Tax Division, 238 Ind. 111, 149 N. E. 2d 115 (____) and Pure Oil Co. v. State of Alabama, 244 Ala. 258, 12 So. 2d 861, 148 A.L.R. 260 (1943).

A number of inferior Federal courts have taken the view adopted by Mississippi in this case. The precise question involved here, relative to the incidence of the Mississippi gasoline excise tax, was decided by a three judge constitutional court in United States v. Sharp, Motor Vehicle Comptroller, 302 F.Supp.668 (1969 S.D.Miss.,1969). In that case, United States sought an adjudication of the three-judge court that the Mississippi privilege tax imposed on gasoline distributors was a tax upon the consumer of such gasoline and that, therefore, since the tax had been paid on gasoline purchased by the government, it was entitled to refund under its immunity from state taxation. Likewise involved was a charge of discriminatory application of exemptions of governmental entities from payment of the gasoline tax which is not pertinent here. Judge Dan Russell speaking for the panel disposed of this contention in the following language:

> . . .We do not quarrel with the contention that a statute's practical operation and effect determines where the legal incidence of the tax falls. We simply agree that the tax burden in the Mississippi statute falls plainly and squarely on the distributor, to whom the state looks for the payment of the tax, albeit the amount of th' tax may ultimately be borne by the vendee, in this case the federal government.
>
> . . .Hence we find that Mississippi's gasoline tax is not such a tax to afford immunity to the plaintiff, except when it has received specific exemptions such as for gasoline used by the armed forces of the United States. As stipulated, this exemption has been in effect throughout the period of this claim and is now in effect by Section 10013-39 of the Mississippi statutes.
>
> In sum, the Court finds as a fact that the tax in suit at all times was levied and assessed against and collected by the State of Mississippi from a gasoline distributor, duly qualified under its laws, and never collected any such tax in suit (directly or indirectly) from the United States or any of its agencies; and that the defendant never discriminated against the Plaintiff in any manner in its administration of said privilege or excise tax law, according to the undisputed evidence and testimony in this case.

The Court in the Sharp case, supra, pointed out, in its opinion, that the Comptroller General of the United States opinion that the Comptroller General of the United States

had rendered an opinion both in 1942 and in 1944 which found that the legal incidence of the Mississippi gasoline tax and that imposed by seven other states having similar statutes, falls on the vendor rather than the vendee. This opinion states that the decision of the United States Supreme Court in Alabama v. King and Boozer, supra, leaves no room for doubt that a vendor who sells supplies to the United States is not, merely because of the immunity of the Federal Government from state taxation, exempt from payment of a state tax imposed unless the legal incidence of that tax is upon the vendee.

The petitioner here has asserted that the producer-distributor acts only as a trustee for the Federal or state taxing authorities in the collection and remittance of the excise taxes, a concept for which the only authority offered is a district court decision relating to jewelry excise taxes.

We submit that a Louisiana District Court decision has held that the obligation of a taxpayer to pay state excise taxes is simply a general obligation of that distributor and that the state has no superior lien against the corporate assets on the basis of such a trust theory. State of Louisiana v. Atlas Pipe Line Corporation, 33 F. Supp. 160 (D.C. La., 1940), contains this holding:

> . . .Nowhere do I find any provision for a lien of any sort. On the contrary, the requirements, such as giving of bond, making reports and penal provisions, were intended to prevent the loss of the tax through the obviously easy mean of disposing of it or consuming the gasoline. The dealer is liable for the tax whether he collects an amount sufficient to cover it from

those to whom he sells or not.

Respondent's position in this case was set forth as a correct interpretation of the law in the Ninth Circuit in Martin's Auto Trimming, Inc. v. Riddell, 283 F. 2d 503 (9th C.A. 1960). In that case the plaintiff sought to obtain a return of manufacturing taxes later passed on to consumers. The Court said:

> Appellants main reliance is placed on Indian Motorcycle Company v. United States, 283 U.S. 570, 51 S.Ct. 601, 15 L. Ed. 1277 (1931), Standard Oil v. United States, 130 F. Supp. 821. . .
>
> It is obvious the Appellant has misread the effect of the decisions in these cases. None of these cases hold that the excise tax is imposed upon the purchaser. All of those cases hold that the tax is the obligation of the manufacturer when the product is sold. The excise tax in question on this appeal is the tax which was imposed upon sales by Appellant during the period mentioned. (P. 505)

This doctrine was also adopted by the Seventh Circuit in 1971 in Agron v. Illinois Bell Telephone Company, 449 F. 2d 906 (7th C. A. 1971), in which the Circuit Court cites and quotes from the opinion on Lash's Products Company case with respect to the legal incidence of Illinios taxes on communications services. The Circuit Court held that, even though additional charges imposed on Agron and other telephone subscribers may be directly attributed to state and local taxes paid by Illinois Bell, those additional charges are nevertheless a part of the price

IBT demands for its services. Accordingly, they are held properly a part of the base for computation of federal excise taxes. The Court stated:

> "It may be that IBT normally "passes on" to its subscribers the economic burden of the state and local occupation taxes, just as every item of operating expense - including state and federal taxes - if it is to operate profitably. But the fact that the telephone subscriber ultimately bears the financial burden of the tax does not justify our ignoring the clear language of the Illinois statute and holding that the tax is "imposed" on subscribers.

Additionally, support for this view from various state jurisdictions can be found in cases dating back for many years. An annotation appears in 148 A.L.R. 263 at the conclusion of the opinion there reported of the case of *Pure Oil Co. v. State of Alabama*, 244 Ala. 258, 12 So. 2d 861 148 A.L.R. 260 (1943). This annotation was supplemented in 174 A.L.R. 1263. We believe that the great preponderance of the factually applicable cases in those annotations support the respondent's positions here.

POINT 4

MISSISSIPPI'S DETERMINATION OF THE LEGAL INCIDENCE OF ITS OWN EXCISE TAX SHOULD BE ACCEPTED AS FINAL BY THE SUPREME COURT OF THE UNITED STATES UNDER ITS PRIOR CASE LAW.

There is no doubt that the Supreme Court of Mississippi has determined the legal incidence of both the Federal and Mississippi gasoline excise taxes to fall upon the producer-distributor; the Court so decided in the decision being reviewed here. Respondent respectfully submits that, except where the issue of Federal immunity from taxation is raised, Federal Courts, including the Supreme Court of the United States, have considered themselves bound by state court determinations of the incidence of state taxing schemes. Questions of construction of state statutes have always been within the province of State Supreme Courts, as evidenced by the following language of this Court in <u>Alabama v. King and Boozer</u>, supra:

> The taxing statute, as the Alabama Courts have held, makes the "purchaser", liable for the tax to the seller who is required "to add to the sales price" the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or credit. Who, in any particular transaction like the present, is a "purchaser" within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. (Page 9-10)

In addition, the decision of the Supreme Court of the United States in the case of

Federal Land Bank of St. Paul v. Bismarck Lumber Company, 314 U.S. 95, 62 S.Ct. 1, 86 L. Ed. 65, is direct authority for the proposition that the determination of the highest Court of the state is controlling upon the question as to whether the legal incidence of a tax imposed by a law of that state is upon the vendor or the vendee. See also United States v. Sharp, 302 F. Supp. 668 (S. D. Miss. 1969).

It is only when the question of federal immunity is raised that federal courts may examine the taxing schemes to determine the operating incidence of the tax, as is evidenced by the following language from Society for Savings v. Bowers, 349 U. S. 143, 75 S.Ct. 607, 99 L. Ed. 950 (1955)

> Because the question here is whether the tax affects federal immunity, it is clear that for this limited purpose we are not bound by the State Court's characterization of the tax. (Emphasis added)

See also Agricultural National Bank v. State Tax Commission, 392 U. S. 339, 88 S.Ct. 2173, 20 L. Ed. 2d 1138 (1968). But it is apparent that even where the constitutional validity of the state's scheme is in question, Federal Courts are obligated to give State determinations great effect in their consideration. In American Oil Company v. Neill, 380 U. S. 451, 85 S.Ct. 1130, 14 L. Ed. 2d 1 (1965), the Court said:

> When a State Court has made its own definitive determination as to the operating incidence, our task is simplified. We give this finding great weight in determining

> the natural effect of the statute, and if it is consistent with the statute's reasonable interpretation, it will be deemed conclusive.

Petitioner argues in Point I E. that the Mississippi taxing arrangement is a tax on one person's property or income by reference to the property or income of another and therefore, contrary to the due process guaranties of the Fourteenth Amendment. The single case cited by the petitioner is not factually comparable in any way to the case at bar.

In light of the authorities cited above in this point, it seems evident that the determination of whether or not a state interpretation of the legal incidence of its own tax will not offend the Constitution of the United States nor be disturbed by Federal Courts unless federal immunity is involved or the statute has been unreasonably interpreted.

CONCLUSION

The petitioner posed three questions in the beginning of his brief. To the first, we believe that the foregoing authorities clearly weigh in favor an interpretation that both Federal and State Excise taxes on gasoline are imposed upon the distributor-producer and not upon the purchaser.

The second question of petitioner asked whether or not state sales tax on federal excise tax violates the Fifth and Fourteenth Amendments of the Constitution of the United States and violates the Federal Government's immunity from taxation by a state. We believe that this question, to some extent, begs the question or presumes that such

excise taxes are only collected by the dealer from the taxpayer and held in trust in the nature of withholding taxes. Since the authorities presented in this brief are manifest that such an interpretation of excise taxes is not correct the question is, we submit, more accurately stated in the respondent's brief as whether or not the refusal of Mississippi to permit such a dealer to deduct an amount equal to the Federal excise taxes from the gross proceeds sales tax base violates either those constitutional provisions or the federal immunity. We believe that this brief, and certainly the opinion of the Mississippi Supreme Court, have persuasively shown that, under the authority of Alabama v. King and Boozer, supra, and the other cited authorities, this question must be answered that such taxing arrangement is not violative of either the Federal Constitution or federal immunity.

The third question posed by the petitioner is virtually the same as the second except with respect to Mississippi excise taxes while the second question dealt with Federal excise taxes. For all of the same reasons, plus the legally conclusive nature of the state court's determination of state law, the answer to that question must be likewise.

Respondent respectfully submits that the decision of the Mississippi Supreme Court in Gurley v. Rhoden should be affirmed by the Supreme Court of the United States.

Respectfully submitted,

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By:________________________

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Hunter M. Gholson, one of the counsel for the Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ___ day of January, A.D., 1975, I served copies of the foregoing Respondent's Brief to the Supreme Court of the United States on all parties required to be served, by depositing a copy of said Brief in the United States Post Office properly addressed, with first class postage prepaid, to Mr. Walter P. Armstrong, Jr. and Hubert A. McBride, 15th Floor Commerce Title Building, Memphis, Tennessee 38103; and Charles R. Davis, David H. Nutt and Thomas W. Tardy, III, 507 First National Bank Building, Post Office Drawer 1532, Jackson, Mississippi 39205, Counsel for Petitioner.

HUNTER M. GHOLSON

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1734

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Petitioner,

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1734

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Petitioner,

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

REPLY BRIEF FOR THE PETITIONER

I.

INTRODUCTION

It is Gurley's position in response to the Brief For the Respondent that a careful analysis of the authorities cited by Respondent in light of a reiteration and discussion of previous authorities cited by Gurley shows that exclusion of federal and state excise taxes from the sales tax base is well founded. A logical analysis and discussion of the points raised by Respondent in the order of their presentation in the Brief For the Respondent indicates that the weight of authority runs contra to the position taken therein by the Respondent.

II.

THE FEDERAL EXCISE TAX IS A TAX UPON THE SALE OF GASOLINE WHICH IS TAXABLE TO THE PURCHASER-CONSUMER THEREOF.

> There is hereby imposed on gasoline *sold* by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon (Emphasis added). 26 U.S.C. § 4081.

The respondent asserts in his brief that the above statutory language places the tax liability upon the producer. To the contrary, petitioner submits that this very language conclusively places the federal tax upon the sale, rather than the producer or retailer. The excise tax, like the state sales tax, does not, and cannot possibly attach until the very moment of the sale. Therefore there can be no sales tax on the excise tax and the excise tax itself must be upon the consumer, rather than the producer or retailer. The legislative intent, as discussed in petitioner's main brief, further substantiates this position.

Petitioner asserts that the practical operation and effect of the statute dictates where the legal incidence of the tax falls; to determine the practical operation and effect this Court should concern itself with substance rather than form.[1]

Petitioner argues that the refunding statutes which provide a return of tax monies to the consumer for non-highway use of gasoline are irrebuttable proof that the legal incidence of the tax is on the person who receives the refund. Nowhere in state or federal tax structures is there found a provision for return of taxes to anyone

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1. *See Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435 (1940); *Lawrence* v. *State Tax Comm'n*, 286 U.S. 276 (1932).

but to the person paying them. Respondent contends that the purpose of the refund provisions is to provide tax relief to the consumer who, he claims, bears only the economic burden of the tax. (respondent's brief pages 18-19). Surely there is no reason to allow the consumer a refund for excise tax on gasoline and deny him a refund for other taxes for which he also bears the economic burden. Such refunds to one other than the taxpayer would not be for a public purpose and thus would render the Federal gasoline tax unconstitutional unless the legal incidence of the tax is deemed to be imposed on the consumer who receives the refund. Statutes should be construed so as to preserve their constitutionality.[2]

It is also significant to note that the Mississippi State Tax Commission admits that the Federal excise tax on diesel fuel is not includable within the gross proceeds of sale for sales tax purposes. (App. 39, 54). The tax on diesel fuel is collected and remitted in exactly the same manner and, as a matter of fact, even on the same forms as the Federal excise tax on gasoline. Thus, the collecting and remitting procedures are exactly the same on diesel fuel as on gasoline and this cannot be considered the determining factor as to the incidence of the tax. (App. 48).

Petitioner, therefore, would submit that all factors involving a determination of the incidence of the Federal excise tax dictate a finding that it is a use tax upon the consumer and should not be included within the gross proceeds of sales for sales tax purposes.

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2. *Savings and Loan Assoc.* v. *Topeka*, 87 U.S. 655 (1875); *Monamotor Oil Co.* v. *Johnson*, 3 F.Supp. 189 (S.D. Iowa, 1933), *aff'd* 292 U.S. 86 (1934).

III.

THE STATE EXCISE TAX IS ALSO UPON THE CONSUMER.

Though the statutory language of the state excise tax differs slightly from its federal counterpart, in substance and effect the statutes are identical. The purpose of both statutes is to provide for a highway building and maintenance fund, which is equitably financed by distributing the costs of highway construction and maintenance to those persons who *use* the highways. The state refund provisions are, in substance and effect, identical to those provided by the federal government. The basic purpose of both federal and state refund provisions is to refund taxes on gasoline not used on the highways. Both provide for refunds to the consumers who are the taxpayers.[3] Respondent has argued that the state excise tax "attaches" when the gasoline is brought into the state[4] and the taxing authority does not care what happens to the gas after the tax has attached.[5]

Regardless of the language of the state statute, the substance and effect of the law is to tax the sale, as is evidenced by the fact that Gurley has twenty to fifty days after his importation of gasoline before the state

3. As pointed out in petitioner's main brief, to provide refunds to one other than the taxpayer would constitute an abuse of the power to tax. (petitioner's brief pages 32, 42, 43).

4. Respondent makes no similar contention in regard to the federal tax.

5. Respondent cites certain Mississippi Code sections which were amended in 1970 to exclude the provisions stating that the petitioner could "pass the tax on" to include a provision which stated that the tax attaches upon the gasoline's entry into the state. Petitioner would point out that three-fourths of the tax period contested in the case at bar is covered under the unamended statutes which are obviously more favorable to the petitioner's case.

tax becomes due.[6] Since all of Gurley's sales are consummated within seven days of the importation, it is obvious that the state tax is measured by and paid on the number of gallons sold each month. In Gurley's case the tax is not due until after the gasoline has been sold. If Gurley chooses to remove some gasoline from the state, the gasoline is not subject to Mississippi excise tax. If Gurley chooses to merely transport the gasoline from Arkansas through Mississippi to Tennessee, the gasoline (thereby being subject to the Mississippi excise tax according to the language of the statute) is not taxable. (App. 49-52). Obviously, in substance and effect, the Mississippi tax, like the federal tax, "attaches" upon the sale by the petitioner to the ultimate consumer and is, in essence, a use tax upon the consumer of the gasoline.

IV.

THE PREVIOUS DECISIONS OF THE SUPREME COURT OF THE UNITED STATES SUPPORT THE PETITIONER'S POSITION THAT THE FEDERAL AND STATE EXCISE TAXES ARE UPON THE CONSUMER.

Petitioner does not question whether or not the "*Panhandle*[7] economic incidence test" (if ever there was such) was ruled no longer tenable by *King & Boozer*.[8] However, petitioner strongly asserts that the *Panhandle* case placed the legal incidence of the Mississippi excise tax

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6. § 27-55-13 Miss. Code Ann. (1972) requires remittance of the state tax within twenty days of the month following the receipt of the gasoline.

7. *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928).

8. *Alabama* v. *King & Boozer*, 314 U.S. 1 (1941).

on gasoline *squarely* upon the consumer, which was the United States.[9] The Court stated

> "It is immaterial that the seller and not the purchaser is required to report and make payment to the state." 277 U.S. at 222.

Neither *King & Boozer* nor *Kern-Limerick*[10] altered the legal incidence of the Mississippi state excise tax on gasoline; in both cases the legal incidence of the contested taxes was placed squarely upon the purchasers. The controversy in both cases involved the identity of the purchaser. In *King & Boozer* the contractor was the purchaser, and in *Kern-Limerick* it was the United States.[11] (*See* petitioner's main brief pages 39-41).

The Mississippi excise tax on gasoline has not been altered appreciably since the *Panhandle* decision in 1928. Subsequent to *Panhandle* the Mississippi legislature amended the excise law, prefaced by the following: "an act to amend Section 2, Chapter 119, Laws of 1926, changing the manner of determining the excise tax on the *sale*

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9. The Mississippi Supreme Court agreed with this contention,

> "[The United States Supreme] Court held that the state excise tax was on the consumer and since the federal government was the consumer, the state could not collect the tax." *Gurley* v. *Rhoden*, 288 So.2d 868 (Miss. 1974) cited at page 27 of Appendix A to the petition for a writ of certiorari.

10. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110 (1954).

11. Contrary to the assertions in the respondent's brief (Pages 9, 21) the *Panhandle* decision does not narrowly define its holding to the legality of the state *sales* tax on sales to the federal government. In fact, this Court ruled upon the incidence of the Mississippi gasoline *excise tax*, and there was no attempt made by the state in *Panhandle* to impose a sales tax on the United States. Obviously respondent's argument, erroneously based on the assertion that a sales tax was involved in *Panhandle*, is not persuasive.

or use of gasoline by persons in motor driven vehicles upon public roads and streets in the state, providing for the granting of permits to distributors and wholesale dealers, requiring reports, fixing penalties and providing for *securing* of the payment of said excise tax." Act of April 26, 1928, Ch. 198 (1928) Gen. Laws of Miss. 266. (Emphasis added). It should be noted that the legislature positively recognized that the tax was upon the *sale or use* of the gasoline by the ultimate consumer under its amended provision. The legislature could have amended this section to specifically state that the burden of the excise tax rested upon the distributor had it desired to achieve this end. It is also obvious that the purpose of this act was to provide an operational procedure for reporting and paying into the state taxes collected from the consumer and providing bond therefor; the purpose obviously was not to tax the distributor. Therefore, this Court's determination in *Panhandle* that the legal incidence of the Mississippi excise tax on gasoline is on the consumer should be conclusive as to the incidence of the Mississippi excise tax in the incident case.

Panhandle is supported by *Indian Motocycle*[12] wherein this Court considered a tax on motorcycles levied as of the time of sale. The Court stated: "the requirement that the tax be paid by 'the manufacturer, producer or importer,' [was] intended to be no more than a comprehensive mode of reaching all first or initial sales, and that it [did] not reflect a purpose to base the tax in any way on manufacture, production or importation." 283 U.S. at 573, 574. It is submitted that the operative language of the federal excise tax and the substance and effect of the state tax are identical to the taxes deter-

12. *Indian Motocycle Co. v. United States,* 283 U.S. 570 (1931).

mined in *Panhandle* and *Indian Motocycle* to be on the consumer.

Respondent has alleged that its position is supported by the case of *Lash's Products Co.* v. *United States*,[13] a half-page opinion involving a manufacturer of soft drinks who failed to make the tax itself a separate item of his bill. The Court stated that since the manufacturer did not adhere to the requirement of a separately stated tax on his bill, he could not contend that the purchaser of his product (who was a wholesaler and not an ultimate consumer of the product) actually paid the tax. It seems that, if the statutory requirements were adhered to in that case, then the tax would be upon the consumer. Petitioner would assert that this brief, limited decision offers this Court little assistance in its determination of the case at bar.

Respondent has also asserted that its position is supported by the case of *Wheeler Lumber Co.* v. *United States*.[14] In that case this Court ruled that the incidence of a tax on transportation was on the person who owned the goods at the time the tax was payable. Since the goods had been shipped FOB place of destination there was no question that the owner of the goods was the lumber company and not the county government, for the county did not take ownership of the lumber until the transportation of the goods had been completed. In fact this Court distinguished *Panhandle* by stating:

> "there is no delivery, and therefore no sale, until after the transportation is completed. Upon these facts, recited in the question, we are of the opinion that

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13. *Lash's Products Co.* v. *United States*, 278 U.S. 175 (1929).

14. *Wheeler Lumber Co.* v. *United States*, 281 U.S. 572 (1930).

the transportation is not a service rendered to the county . . . but is a service rendered to the vendor . . .

The tax is *not laid* on the sale nor because of the sale. It is laid on the transportation and is measured by the transportation charges . . . It follows that the tax on the transportation cannot be regarded as a tax or a burden on the sale."

"As the tax is not laid on the sale or in any wise measured by it, the case of *Panhandle Oil Co.* v. *Miss.* . . . is not in point." 281 U.S. at 579.

It is obvious that this Court saw no similarities in the tax on transportation in *Wheeler* and the Mississippi excise tax on gasoline in *Panhandle*. Consequently, it is submitted that neither *Wheeler* nor *Lash's Products* is applicable to the incident case and that *Panhandle* and *Indian Motocycle* are controlling as to the time the excise taxes are imposed and as to legal incidence of both excise taxes.

V.

THE BETTER REASONED LOWER COURT DECISIONS INDICATE THAT THE EXCISE TAX ON GASOLINE IS A USE TAX UPON THE CONSUMER.

The Mississippi State Tax Commissioner makes no attempt in his brief to distinguish the cases favorable to the petitioner.[15] Respondent has, however, quoted exten-

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15. Respondent has erroneously stated that the Indiana decision is favorable to the petitioner. (respondent's brief page 95). Respondent apparently refers to the North Dakota decision of *Standard Oil of Indiana* v. *State Tax Commissioner*, 71 N.D. 146, 299 N.W. 447 (1941) discussed in Point I.B. of the petitioner's brief. (pages 28-29). Additionally, respondent erroneously insinuates that only these two states cited on page 25 of its brief have placed the legal incidence of the federal tax upon the consumer. The following cases, all of which are discussed or cited in peti-

(Continued on following page)

sively and in great detail from the decisions of *Martin Oil Service, Inc.* v. *Illinois Department of Revenue,* 49 Ill.2d 260, 273 N.E.2d 823, *cert. denied,* 405 U.S. 923 (1971) and *Ferrara* v. *Director, Division of Taxation,* 2 CCH State Tax Reports, N.J. Para. 200-583 (1973). Gurley would first point out that the *Ferrara* case has been erroneously referred to by respondent as being decided by a "New Jersey Court" (pages 31, 32 respondent's brief) when in reality the decision cited is only an opinion written by an administrative division of the New Jersey Treasury Department, which, it would seem, is the equivalent of an opinion rendered by the Mississippi Tax Commission. Gurley would assert that this "opinion" by the New Jersey administrative agency is not persuasive and should be given no weight whatsoever in the decision of the case at bar.

Moreover, close analysis of the *Ferrara* decision regarding the inclusion of the federal excise tax on gasoline within the base of its unincorporated business tax indicates that this administrative review board establishes no logical reasoning for their decision to include this tax.

It should be noted that the New Jersey review board in justifying its decision that the excise tax is imposed upon the producer not the consumer *misquoted* the appli-

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Footnote Continued—

tioner's main brief (pages 33-35) place the legal incidence of the federal tax upon the consumer: *Tax Review Board of Philadelphia* v. *Esso, Standard Division,* 424 Pa. 355, 227 A.2d 657, *cert. denied,* 389 U.S. 824 (1967); *Gulf Oil Corp.* v. *McGoldrick,* 9 N.Y.S.2d 544 (1939); *Kesbec, Inc.* v. *Taylor,* 2 N.Y.S.2d 241 (1938); *Standard Oil Co.* v. *State,* 283 Mich. 85, 276 N.W. 908 (1937); *Socony-Vacuum Oil Co.* v. *New York,* 287 N.Y.S. 288 (1936). Petitioner would also point out that the vast majority of the remaining states do not even attempt to levy a sales tax on any part of the sales price of gasoline and that only a select few attempt to levy sales tax upon federal or state excise taxes on gasoline; therefore, there has been no litigation involving the legal incidence of the gasoline excise taxes in those states. *See generally CCH All State Sales Tax Rep.*

cable statute (26 U.S.C. § 4081) in a portion of the opinion as follows:

> "Section 4081 of the federal tax, supra, provides that the tax is 'imposed on gasoline sold *on* the producer or importer thereof'" (Emphasis added).

Thus, the review board, in its enthusiasm, misquoted Section 4081 in order to place the tax *on* the producer, rather than on the gasoline *sold by* the producer. In fact, the New Jersey administrative body based its whole theory of the incidence to the federal excise tax on its misquotation of the federal statute. No other logic or reasoning is espoused for its decision.

The *Martin Oil* decision, and *Agron* v. *Illinois Bell Telephone Company*, 449 F.2d 906 (7th Cir. 1971), relied upon by the Mississippi Tax Commissioner, are both decisions based on the Illinois law. Petitioner would contend that, in light of *American Oil Co.* v. *Mahin*, 49 Ill.2d 199, 273 N.E.2d 818 (1971), the *Agron* case is not relevant to the case at bar. *Agron* is a federal decision interpreting an Illinois law on a communications tax. *American Oil* interprets Illinois law as to the legal incidence of the state excise tax on motor fuel. In that case the Illinois Supreme Court placed the incidence of that tax squarely upon the consumer and specifically stated that the distributor acted only as a collection agent for the state.

The reasoning used by the Illinois court in *Martin Oil* to discount the relevance of refunds to non-highway users is based upon unsound logic. The Illinois court stated that the refunds are not refunds in a "technical sense" but rather allowances to certain consumer producers based on a recognition that the economic burden of the gasoline tax falls on the ultimate consumer. As stated hereinabove there are no tax provisions which allow a

tax refund to anyone except the *ultimate taxpayer.* It is much more palatable to believe that since all federal gasoline excise tax funds are earmarked for highway purposes the funds paid in by consumer taxpayers who are not highway users should be refunded to them in order to maintain Congress's state goal of taxing those who receive the benefit of the facilities which are funded by these taxes.

The *Martin* court attempts to further bolster its position by minimizing the opinions of Congressional committees concerning the federal excise tax as being a user tax. An analysis of the legislative history cited in the petitioner's main brief indicates that the Congress through its committees has forthrightly and unequivocally determined that the federal gasoline excise tax is upon the consumer.

Likewise the argument adopted by the Illinois Supreme Court in the *Martin* decision--that operations similarly situated to petitioner Gurley (in which the only sale is to the ultimate consumer) has no relevance in determining the legal incidence of the tax—is not well founded. The language of the statute indicates that in Gurley's case, the federal excise tax attaches at the time of his only sale which is at the retail level. It is plain, it is definite and is unequivocal if the tax attaches at the time of sale, it cannot be built into the sale's price at any point. It cannot be an inclusion which is passed on to the consumer as the tax cannot attach until there is a sale and in the petitioner's case this sale is to the ultimate consumer. There is no conceivable way under the wording of the federal statute or under the substance and effect of the state statute by which producers situated such as the petitioner can "build in" this tax within their sales price.

The respondent has erroneously stated that Gurley offers only one case as authority for the assertion that the producer acts as an agent for the collection of the excise taxes. (respondent's brief page 35). On page 36 of the petitioner's main brief there are cited seven cases which substantiate petitioner's contention. As stated in the petitioner's main brief, it is common for one party to collect and remit a tax imposed on another, particularly when, as here, the class of taxpayers upon whom the tax is legally imposed is very numerous.

In addition to the authorities already cited, Gurley submits the following. In the case of *Standard Oil Co.* v. *Kurtz,* 330 F.2d 178 (8th Cir. 1964) the Court of Appeals for the Eighth Circuit ruled that the legal incidence of the Nebraska excise tax on gasoline was on the consumer and that the dealer was merely acting as agent for collection of the tax. In a well reasoned opinion the court quoted *Burke* v. *Bass,* 123 Neb. 297, 242 N.W. 606 (1932), wherein the Nebraska court stated:

> "The tax is an excise tax upon the use and distribution of gasoline within the state . . . It is not an impost tax. It applies to all motor vehicle fuels used and distributed within the state. For convenience, it is collected as nearly as possible to the source of production, from him who has it in his possession for use, distribution, sale or delivery in the state. . . .
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> The construction of such a statute must be judged by its necessary effect. . . . The effect of this statute is to tax the use and sale within the state." 242 N.W. at 607.

The federal court thus concluded: "from this language it is evident that (a) the tax is an excise upon the use

of gasoline, and (b) it is collected 'for convenience' from the dealer." 330 F.2d at 182. The court then stated:

> "[W]e find support for our conclusions in the following: *Monamotor Oil Co.* v. *Johnson,* 292 U.S. 86 (1934) (concerning the Iowa statute which had striking similarity to that of Nebraska, with the court concluding that the tax was an excise tax upon the use of fuel for motor vehicles on the highway of the state and 'that the statute properly construed laid no tax whatever upon distributors, but make of them mere collector from users of motor vehicle fuel'); *Texas Co.* v. *Miller,* 165 F.2d 111, 114 (5th Cir. 1947), *cert. denied,* 333 U.S. 880 (1947) (The Texas statute . . .), *Commonwealth* v. *Wallace,* 294 Mass. 31, 200 N.E. 406 (1936) (The Massachusetts statute)." 330 F.2d at 184.

VI.

DETERMINATION BY THE SUPREME COURT OF MISSISSIPPI OF THE LEGAL INCIDENCE OF ITS OWN EXCISE TAX IS NOT BINDING ON THE SUPREME COURT OF THE UNITED STATES WHERE CONSTITUTIONAL RIGHTS ARE INVOLVED.

Respondent states in Point IV of his brief that the Supreme Court of Mississippi has determined the legal incidence of both the federal and Mississippi gasoline excise taxes to fall upon the producer-distributor and that the Supreme Court of the United States should be bound by the Mississippi Supreme Court's determination of the legal incidence of its own excise tax.[16] However, the authorities cited by respondent are not persuasive in support of this proposition.

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16. Respondent makes no contention that this Court is "bound" by the Mississippi Supreme Court's interpretation of federal excise tax on gasoline.

In respondent's brief at page 38 the case of *Alabama* v. *King & Boozer, supra,* is quoted for the principle that state supreme courts are the final authority as to the incidence of that state's excise tax. However, *King & Boozer* does not speak to that principle but merely refers to the power of the state court to determine who is responsible under Alabama law for payment to the state of the exaction. In *Kern-Limerick, Inc.* v. *Scurlock, supra,* this Court made the following comment about the excerpt from *King & Boozer* quoted at page 38 of respondent's brief:

> "Read literally, one might conclude this Court was saying that a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign. Such a conclusion as to the meaning of the quoted words would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest. The quotation refers, we think, only to the power of the state court to determine who is responsible under its law for payment to the state of the exaction. The formulation of the 'precise question' at the first of the quotation from *King & Boozer* (U.S.) supra page 319, indicates this." 347 U.S. at 121, 122.[17]

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17. "*New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals*, 338 U.S. 665 (1950); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 83 (1946); *United States* v. *Allegheny County*, 322 U.S. 174 (1944); *Union P.R. Co.* v. *Public Service Comm.*, 248 U.S. 67, 69 (1918). *Cf. West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 29 (1951).

This principle covers the question of who is the 'purchaser.' *S.R.A., Inc.* v. *Minnesota*, 327 U.S. 558, 564 (1946); *National Metropolitan Bank* v. *United States*, 323 U.S. 454, 456 (1945); *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1941)." 347 U.S. at 121.

It is obvious from the above quoted passage that this Court is not bound by the Mississippi Supreme Court's interpretation of its gasoline excise tax under the circumstances of this case.[18]

Respondent also cites the case of *Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941) as direct authority for the proposition that this Court would be bound by the state supreme court's determination of the incidence of its own excise tax and reference is made to *United States* v. *Sharp*, 302 F.Supp. 668 (S.D. Miss. 1969), which merely refers to the *Bismarck* decision. However, it should be pointed out that the legal incidence of the North Dakota sales tax was not at issue in *Bismarck*, since the State Tax Commission of North Dakota conceded the point that the North Dakota statute made the purchaser liable for the sales tax. Accordingly, since this Court in *Bismarck* held that the Federal Land Bank, as the purchaser of certain building materials subject to sales tax was constitutionally immune from state taxation on activities in furtherance of the lending functions of the Federal Land Bank, this Court merely stated that it would follow the determinations of the incidence of the sales tax by the North Dakota Supreme Court.

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18. Perhaps the most persuasive indication of the inability of the Mississippi Supreme Court to bind this Court is the very fact that the state court did not feel "bound" by either its prior determination of legal incidence of the state excise or by this Court's determination in *Panhandle*.

In 1947 the Mississippi Supreme Court, basing its decision on the statutory refund provisions and on the logic espoused in *Panhandle*, held in *State* v. *Republic Oil Co.*, 202 Miss. 688, 32 So.2d 290 (1947), that:

> "The . . . tax is not upon the appellee [a distributor] or other distributors either at wholesale or retail, but is upon the ultimate consumer; is a use tax for the use of the public highways by the consumer and is not to be collected for uses other than upon the public highways." *Id.* at 692, 32 So.2d at 294. [Emphasis added].

Respondent concedes that where the question of federal immunity is involved that federal courts may examine the taxing schemes of a state to determine the operating incidence of the tax. A quotation allegedly from *Society for Savings* v. *Bowers*,[19] 349 U.S. 143 (1955) is cited at page 38 of respondent's brief to support this statement. *Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339 (1968) is also cited by respondent. It is submitted by petitioner Gurley that an examination of the *Bowers* and the *Agricultural National Bank* cases shows that where any federal or constitutional right is concerned that the United States Supreme Court will not be bound by the characterization given to a state tax by state courts or legislatures or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal or constitutional right asserted. Obviously as pointed out by respondent in its quotation from *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965) the state court determination must be given weight, but the Supreme Court of the United States may make its own reasonable interpretation of the state statute where constitutional rights are asserted.

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19. The quotation which respondent cites does not appear within the *Bowers* decision. In fact, the *Bowers* case appears favorable to petitioner's contention that this Court is not bound by the lower court's decision. In *Bowers*, this Court stated:

> "The Ohio court, however, has held that this tax is imposed on the depositors. But that does not end the matter for us. We must judge the true nature of this tax in terms of the rights and liabilities which the statute, as construed, creates. In assessing the validity of the tax under federal law, we are not bound by the state's conclusion that the tax is imposed on the depositors, even though we would be bound by the state court's decision as to what rights and liabilities this statute establishes under state law. The court's mere conclusion that the tax is imposed on the depositors is no more than a characterization of the tax. 'Where a federal right is concerned we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.' " 349 U.S. at 151.

Petitioner Gurley submits that the applicable principle here is that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.[20]

The Mississippi Tax Commissioner has not chosen to rebut petitioner's contention that a tax on one person's property or income by reference to the property or income of another is unconstitutional. Instead, respondent has stated that the authority (*Hoeper* v. *Tax Commissioner*, 284 U.S. 206 (1931)) cited is not factually comparable to the incident case. In response to respondent's statement, petitioner submits that this Court, in ruling upon *Hoeper*, cited the case of *Knowlton* v. *Moore*, 178 U.S. 41, 77 (1900) wherein the Court stated:

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

The *Hoeper* Court then stated:

> "We have no doubt that, *because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law*

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20. *Richfield Oil Corp.* v. *State Board of Eq.*, 329 U.S. 69 (1946). *See also Napue* v. *Illinois*, 360 U.S. 264 (1959); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951).

as guaranteed by the Fourteenth Amendment." (Emphasis added). 284 U.S. at 215.

VII

CONCLUSION

Petitioner asserts that the legislative purpose in passage of both contested excise taxes is the strongest indication that the incidence of the taxes is upon the consumer. Both Congress and the Mississippi legislature needed a source of revenue for construction of highways. It was only equitable that they distribute the cost of construction in direct proportion to those who use the highways. Since it was burdensome, if not impossible, to establish a system of direct collection from the real taxpayer—the highway user—they, instead, implemented systems for collection from the user by the distributor and remittance by said distributor to the respective government. As previously discussed, if the legislatures had sought to tax the distributors for the privilege of doing business, then they would have taxed each distributor in the distribution system. This obviously was not the purpose or effect of the statutes.

That the actual purpose of the statute is to tax the consumer is further evidenced by the refund provisions of both the federal and state statutes, which provide refunds to the *actual taxpayer* for loss or non-highway use of gasoline. Consequently, for Mississippi to impose upon a distributor a sales tax upon the federal and state excise taxes is clearly unconstitutional, and the judgment of the Supreme Court of Mississippi should be reversed. The reversal of the Mississippi decision would obviously result in a decrease in the cost of gasoline in Mississippi and in all those states which presently impose a sales tax upon the federal excise tax.

Petitioner also submits that the two excise taxes are imposed upon the sale of gasoline and as such these taxes "attach" to the gasoline simultaneously with the Mississippi sales tax and there can be no sales tax upon the excise taxes. Consequently, for this reason, the Court should reverse the decision of the Supreme Court of Mississippi. A reversal of the Mississippi decision for this reason would result in lower gas prices for all consumers who purchase from Gurley or any other independent dealer who buys gas wholesale and sells to the ultimate consumer. A reversal of the Mississippi decision for any aforementioned reason would obviously allow Gurley a refund of the sales tax he has paid under protest. However, such a decision by this Court would not result in a plethora of litigation by others similarly situated to Gurley for refunds of sales taxes already paid, for the Mississippi statutes require that the burden of the taxes for which a refund is sought must have been borne by the person seeking the refund.

In summary, petitioner urges that this Court examine the practical operation and effect of both the federal and state excise taxes on gasoline. It is submitted that both taxes are user taxes imposed upon the sale of gasoline. It is further submitted that the legal incidence of each tax is on the ultimate consumer and not the distributor. As such, Gurley is merely a collector of each tax; the imposition by the Mississippi Tax Commissioner of sales tax on either excise tax is violative of the Fifth and Fourteenth Amendments of the Constitution of the United States, and in the case of the federal tax such an imposition by Mississippi is violative of the federal government's immunity from taxation.

For these reasons, the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles R. Davis, one of the counsel for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of March, 1975, I served copies of the foregoing Reply Brief for the Petitioner on all parties required to be served, by depositing a copy of said Reply Brief for the Petitioner in the United States Post Office, properly addressed, with first class postage prepaid, to Senator William G. Burgin, Jr. and Mr. Hunter M. Gholson, at Post Office Box 32, Columbus, Mississippi 39701, and to Mr. James H. Haddock, 214 Woolfolk State Office Building, Jackson, Mississippi 39201, Counsel of record for the Respondent.

CHARLES R. DAVIS
Counsel for Petitioner

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GURLEY, DBA GURLEY OIL CO. *v.* RHODEN, CHAIRMAN, TAX COMMISSION OF MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 73-1734. Argued March 18, 1975—Decided May 12, 1975

Mississippi imposes a 5% sales tax upon the "gross proceeds" of retail sales of tangible personal property, including gasoline, and such gross proceeds are computed without deduction for any taxes. Mississippi also imposes a gasoline excise tax on each gallon sold by a distributor, which in the case of a distributor bringing gasoline into the State otherwise than by common carrier, accrues at the time when and at the point where the gasoline is brought into the State. And a federal gasoline excise tax is imposed on each gallon sold by a "producer," 26 U. S. C. § 4081, defined to include any person to whom gasoline is sold tax free, § 4082. Contending that the denial of a deduction for the Mississippi and federal excise taxes in computing the gross proceeds of retail gasoline sales for purpose of the sales tax was unconstitutional as a taking of property without due process in violation of the Fourteenth Amendment, and that he acts as a mere collector of the excise taxes whose legal incidence is upon the purchaser-consumer, petitioner, an operator of several service stations in Mississippi who purchased his gasoline tax free in other States and transported it to Mississippi in his own trucks, paid the sales taxes under protest and sued for a refund in state court. His suit was dismissed, and the Mississippi Supreme Court affirmed, holding that the legal incidence of both excise taxes is on petitioner and not on the purchaser-consumer. *Held:* The denial of the deduction of the Mississippi and federal gasoline excise taxes in computing the gross proceeds of retail sales for purposes of the sales tax is not unconstitutional. Pp. 3-12.

(a) As reflected by the language of 26 U. S. C. §§ 4081 and 4082, and their legislative history, the legal incidence of the

Syllabus

federal excise tax is on the statutory "producer," such as petitioner, and not on his purchaser-consumer. Pp. 4–7.

(b) The Mississippi Supreme Court's holding that the legal incidence of the state excise tax falls on petitioner, being consistent with a reasonable interpretation of the statute, is conclusive. Pp. 7–10.

(c) Petitioner's claim that liability for the excise taxes and sales tax arises simultaneously and results in a sales tax upon the excise tax is without merit, since the excise taxes attach prior to the point of the retail sale. Pp. 10–11.

(d) Petitioner is not denied equal protection as against dealers in other States who are not required to include the federal excise tax as part of the sales tax base, since the prohibition of the Equal Protection Clause is against its denial by the State as between taxpayers subject to its laws. Pp. 11–12.

288 So. 2d 868, affirmed.

Brennan, J., delivered the opinion of the Court, in which all Members joined except Douglas, J., who took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73–1734

W. M. Gurley, dba Gurley Oil Company, Petitioner, v. Arny Rhoden, Etc.	On Writ of Certiorari to the Supreme Court of Mississippi.

[May 12, 1975]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Mississippi imposes a 5% sales tax upon the "gross proceeds of the retail sales" of tangible personal property, including gasoline. Miss. Code Ann. § 27–65–17.[1] Petitioner operates as a sole proprietorship from West Memphis, Arkansas. He owns and operates five gasoline service stations in Mississippi and also sells gasoline at four other stations in Mississippi on a consignment basis. He purchases his gasoline tax-free from sources in Tennessee and Arkansas. He transports the gasoline to his Mississippi stations in his own trucks. He holds a Mississippi Distributor's Permit and is also federally licensed because he is a "producer" within the meaning of that federal act as one who sells gasoline bought tax free from other "producers."[2] He adds to his pump prices the amount of a Mississippi gasoline excise tax now nine

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[1] Section 27–65–17 provides in pertinent part:

"Upon every person engaging or continuing within this state in the business of selling any tangible property whatsoever, there is hereby levied, assessed and shall be collected a tax equal to five percent of the gross proceeds of the retail sales of the business, except as otherwise provided herein . . . ."

[2] Title 26 U. S. C. § 4082, *infra*, n. 3.

cents per gallon, Miss. Code Ann. § 27-55-11, and a federal gasoline excise tax of four cents per gallon, 26 U. S. C. § 4081.[3] The State computes his gross proceeds of retail sales "without any deduction for . . . taxes of any kind. . . ." Miss. Code Ann. § 27-65-3 (g).[4] Petitioner contends that the denial of a deduction of the amount of the excise taxes added to his pump prices in the computation of his "gross proceeds of the retail sales" of gasoline, and the resultant application of the 5% sales tax to so much of his pump prices as reflects the amount of the taxes, are unconstitutional. He therefore paid the sales taxes to that extent under protest, and sued for a refund in Mississippi Chancery Court, Hinds County. Respondent cross-claimed for unpaid sales taxes

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[3] Miss. Code Ann. § 27-55-11 provides:

"Any person in business as a distributor of gasoline . . . shall pay for the privilege of engaging in such business . . . an excise tax equal to [specified] cents per gallon on all gasoline . . . sold . . . in this state for sale, use on the highways . . . ."

* * * * *

"With respect to distributors who bring . . . into this state gasoline by means other than through a common carrier, the tax accrues and the tax liability attaches on the distributor . . . at the time when and at the point where such gasoline is brought into the state."

Title 26 U. S. C. § 4081 provides:

"(a) In General—There is imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

Title 26 U. S. C. § 4082 provides:

"(a) Producer . . . any person to whom gasoline is sold tax free under this subpart shall be considered the producer of such gasoline."

[4] Section 27-65-3 (g) provides:

"'Gross proceeds of sales' means the value proceeding or accruing from the full sale price of tangible personal property . . . without any deduction for . . . taxes of any kind except those expressly exempt . . . ."

accruing after the filing of the suit.[5] After trial, the Chancery Court dismissed petitioner's suit and entered judgment for respondent on the cross-claim. The Supreme Court of Mississippi affirmed. 288 So. 2d 868. We granted certiorari, 419 U. S. 1018 (1974). We affirm.

I

Petitioner's principal argument is that he acts as a mere collector of the taxes for the two governments because the legal incidence of both excise taxes is upon the purchaser-consumer. Upon that premise, he argues: "Consequently, to impose the Mississippi sales tax upon amounts so received by [petitioner] would be to tax him upon gross receipts which are not his gross receipts, but rather the gross receipts of [the two governments]. This would not only violate the fundamental conception of right and justice, but it would be taking [petitioner's] property without due process of the Fourteenth Amendment. . . ." Petitioner's Brief, at 37. He cites in support the statement in *Hoeper* v. *Tax Commission*, 284 U. S. 206, 215 (1931), that "any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment."

Also, petitioner advances an alternative argument limited to the denial of the deduction of the amount of the federal excise tax. He contends that the denial results to that extent in "a state tax on . . . monies held in trust by [petitioner] as agent for the United States [and] is, in essence, a tax upon the United States . . . [that] . . . is clearly unconstitutional" as violating the constitutional immunity of the United States and its

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[5] Petitioner sought refunds of $62,782.57 and respondent cross-claimed for $29,131.19.

property from taxation by the States. *McCulloch* v. *Maryland*, 4 Wheat. (17 U. S.) 316 (1819). Petitioner's Brief, at 48.

Petitioner's argument can prevail, as he apparently concedes, only if the legal incidence of the excise taxes is not upon petitioner but upon the purchaser-consumer. Our task therefore is to determine upon whom the legal incidence of each tax is rested.

II

The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise. Therefore, the decision where the legal incidence of either tax falls is not determined by the fact that petitioner, by increasing his pump prices in the amounts of the taxes, shifted the economic burden of the taxes from himself to the purchaser-consumer. The Court has laid to rest doubts on that score raised by such decisions as *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218 (1928), *Indian Motorcycle Co.* v. *United States*, 283 U. S. 570 (1931), and *Kern-Limerick* v. *Scurlock*, 347 U. S. 110 (1954), at least under taxing schemes, as here, where neither statute required petitioner to pass the tax on to the purchaser-consumer. See *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941); *Lash's Products Co.* v. *United States*, 278 U. S. 175 (1929), *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572 (1930); *First Agricultural Bank* v. *Tax Comm'n*, 392 U. S. 339 (1968); *American Oil Co.* v. *Neill*, 380 U. S. 451 (1965).

A majority of courts that have considered the question have held, in agreement with the Mississippi Supreme Court in this case, that the legal incidence of the federal excise tax is upon the statutory "producer" such as petitioner and not upon his purchaser-consumer. *Martin Oil Service, Inc.* v. *Department of Revenue*, 49 Ill. 2d 260, 273 N. E. 2d 823 (1971); *People* v. *Werner*,

364 Ill. 594, 5 N. E. 2d 238 (1936); *Sun Oil Co.* v. *Gross Income Tax Division*, 238 Ind. 111, 149 N. E. 2d 115 (1958); *State* v. *Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S. E. 2d 224, aff'd, 226 Ga. 883, 178 S. E. 2d 173 (1970). Contra, see *Tax Review Board* v. *Esso Standard Division of Humble Oil and Refining Co.*, 424 Pa. 355, 227 A. 2d 657 (1967); cf. *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N. W. 908 (1937); *Standard Oil Co.* v. *State Tax Comm'n*, 71 N. D. 146, 299 N. W. 447 (1941). Our independent examination of the federal statute and its legislative history persuades us also that the legal incidence of the federal tax falls upon the statutory "producer" such as petitioner.

The wording of the federal statute plainly places the incidence of the tax upon the "producer," that is, by definition, upon federally-licensed distributors of gasoline such as petitioner. Section 4082 provides that "[a]ny person to whom gasoline is sold tax free . . . shall be considered the producer of such gasoline," and § 4081 expressly imposes the tax "on gasoline *sold by the producer* . . . ." (Emphasis added.) The congressional purpose to lay the tax on the "producer" and only upon the "producer" could not be more plainly revealed. Persuasive also that such was Congress' purpose is the fact that, if the producer does not pay the tax, the Government cannot collect it from his vendees; the statute has no provision making the vendee liable for its payment.[6]

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[6] Mississippi Act of June 8, 1966, c. 645 (1966), Gen. Laws Miss. 1343, in effect during some of the tax years involved, but since repealed, provided only that the excise tax "*may* be passed on to the ultimate consumer . . . ." (Emphasis added.) In contrast, the Massachusetts' sales tax law before us in *First Agricultural National Bank* v. *Commissioner*, *supra*, expressly provided that the tax "shall be paid by the purchaser," and that the vendor "shall add to the sales price and shall collect from the purchaser the full amount of the tax imposed." 392 U. S., at 347.

First Agricultural National Bank v. *Commissioner, supra*, 392 U. S., at 347.

It is true that the purchaser-consumer who buys gasoline used on his farm, 26 U. S. C. § 6420 (a), or for other nonhighway purposes, § 6421 (a), or by a local transit system, § 6421 (b), can recover payment of all or part of the amount of the tax passed on by the "producer." But this is not proof that Congress laid the tax upon the purchaser-consumer. Rather, since the proceeds of this tax go not into the general treasury but into a special fund used to defray the cost of the federal highway system, S. Rep. No. 367, U. S. Code, Cong. & Admin. News, vol. 2, 87th Cong., 1st Sess. (1961), the refunds authorized simply reflect a congressional determination that, because the economic burden of such taxes is traditionally passed on to the purchaser-consumer in the form of increased pump prices, farmers and other off-highway users should be relieved of the economic burden of the cost of the highway program, and that the cost should be borne entirely by motorists who use gasoline to drive on the highways. *Martin Oil Service, Inc.* v. *Department, supra*, 273 N. E. 2d, at 827.

Petitioner cites references by President Johnson to the tax as a "user tax" as proving that it is not and never was intended that the tax be imposed upon the "producer," but rather upon the purchaser-consumer. President Johnson's message to Congress of May 17, 1965, on the subject of reform of the excise tax structure stated that such "[r]eform . . . will leave . . . excises on alcoholic beverages, tobacco, *gasoline*, tires, trucks, air transportation (and a few *other user charges* and special excises) . . . ." (Emphasis added.) H. R. Doc. No. 173, 89th Cong., 1st Sess., 3 (1965). Petitioner relies also on the Report of the House Ways and Means Committee on H. B. 8371, 89th Cong., 1st Sess. (1965), H. R. Rep.

No. 433, at 14–15. It states, "[t]axes such as those on gasoline . . . are *user taxes* . . . a tax on gasoline taxes users of the highway in rough proportion to their use of the services." (Emphasis added.) But these references obviously were not made in the context of consideration of the legal incidence of the gasoline tax but merely as recognition that the reality is that users bear the economic burden of the tax. These references were rejected in *Martin Oil Service, Inc., supra*, by the Illinois Supreme Court as irrelevant upon the question whether the tax must be considered as one whose incidence rests on the purchaser-consumer. We agree with, and adopt, that court's analysis:

> "We consider the references to the tax as a 'user tax' were not intended to be descriptive of the legal incidence of the gasoline tax. It is not disputed that the ultimate economic burden of the tax rests upon the purchaser-consumer. A practical nontechnical description of the tax as a 'user tax' is explainable, consistently with the legal incidence of the tax being on the producer. The economic burden of the tax has no relevance to the issue before us." 273 N. E. 2d, at 826.

We therefore hold that the Mississippi Supreme Court, which relied upon *Martin Oil Service, Inc.*, 288 So. 2d, at 873, properly concluded that the federal excise tax is imposed solely on statutory "producers" such as petitioner and not on the purchaser.

III

The Mississippi Supreme Court held that the legal incidence of the Mississippi excise tax also falls upon petitioner. It is true of course that this Court is the final judicial arbiter of the question where the legal inci-

dence of the *federal* excise tax falls. But a State's highest court is the final judicial arbiter of the meaning of state statutes. *Alabama* v. *King & Boozer, supra,* 314 U. S., at 9–10, and therefore our review of the holding of a state court respecting the legal incidence of a state excise tax is guided by the following: "When a state court has made its own definitive determination as to the operating incidence, our task is simplified. We give this finding great weight in determining the natural effect of a statute, and if it is consistent with the statute's reasonable interpretation it will be deemed conclusive." *American Oil Co.* v. *Neill, supra,* 380 U. S., at 455–456.

This is manifestly a case in which the holding of the Mississippi Supreme Court that the legal incidence of the state excise tax falls upon petitioner should be "deemed conclusive." Miss. Code Ann. §27–55–11 provides that the tax "attaches on the distributor or other person for each gallon of gasoline brought into the state . . ." in the case of distribution of gasoline by distributors, such as petitioner, who bring gasoline into Mississippi "by means other than through a common carrier." The Mississippi Supreme Court relied primarily upon this provision in reaching its conclusion, and we cannot say that its conclusion is not "consistent with the statute's reasonable interpretation."

Our determination is buttressed by the holding of a three-judge District Court in *United States* v. *Sharp,* 302 F. Supp. 668 (Miss. 1969). The United States sought a declaratory judgment that the Mississippi tax was invalid with respect to gasoline purchased by the Federal Government, its agencies and personnel when used on Mississippi highways on government business. The three-judge court held that the legal incidence of the state tax was upon the distributor-vendor and not upon

the purchaser-United States and dismissed the action. The Court stated:

> "We do not quarrel with the contention that a statute's practical operation and effect determines where the legal incidence of the tax falls. We simply agree that the tax burden in the Mississippi statute falls plainly and squarely on the distributor to whom the state looks for the payment of the tax, albeit the amount of the tax may ultimately be borne by the vendee, in this case the federal government." 302 F. Supp., at 671.

Petitioner argues however that the decision of the Mississippi Supreme Court is foreclosed by this Court's decision in *Panhandle Oil Co.* v. *Knox, supra.* The argument is without merit. In that case Mississippi sued Panhandle Oil Co. to recover gasoline excise taxes imposed by Chapter 116 of the 1922 Mississippi laws, as amended, a predecessor to the present Miss. Code Ann. § 27-55-11. The taxes claimed were on account of sales made by Panhandle to the United States for the use of its Coast Guard Fleet in service in the Gulf of Mexico, and in its Veteran's Hospital at Gulfport, Mississippi. The Court, over the dissent of Justices Holmes, Brandeis and Stone, held that the tax as applied was invalid as a tax upon the means used by the United States for governmental purposes. The dissenters' view was that it was not a tax upon means used by the United States, but that Panhandle merely shifted the economic burden of the tax to its vendees by adding it to the price of the gasoline.

The Court's *Panhandle* opinion did not focus upon whether the Mississippi statute laid the legal incidence of the tax upon the distributor. Rather the rationale was that the tax was bad because, if laid upon distribu-

tors, the distributors were able to shift its burden to the purchaser. The Court has since expressly abandoned that view, and has accepted the analysis of the dissent. In *Alabama* v. *King & Boozer*, *supra*, 314 U. S., at 9, the Court held: "So far as a different view has prevailed, see *Panhandle Oil Co.* v. *Knox* . . . , we think it no longer tenable."

IV

Finally petitioner argues that even if the legal incidence of the two taxes is on him rather than on the consumer, the provision of § 27–65–17 denying the deduction of the taxes in the computation of his "gross proceeds of . . . retail sales" is invalid for two reasons.

First, he argues, "[s]ince [petitioner] sells only to the ultimate consumer, the excise tax attaches simultaneously with the sale and with the sales tax; therefore, there can be no sales tax upon the excise tax." Petitioner's Brief, at 47. In other words, his argument is that the liability for the excise taxes, state and federal, and the liability for the sales tax arise simultaneously, and in that circumstance, one should not be included in computing the other. We read the opinion of the Mississippi Supreme Court to reject this argument and to hold that the taxes fall on the "producer at a time prior to the point of retail sale or other consumer transaction . . . ." 288 So. 2d, at 870. That interpretation of the Mississippi statutes is of course binding on us as respects the state excise tax; indeed, the interpretation is not merely "reasonable," but seems obvious in light of the express provision of § 27–55–11 that in cases of distributors, like petitioner, bringing gasoline into Mississippi in their own trucks the tax "attaches at the time when and at the point where such gasoline is brought into the state." Further, we agree with the Mississippi court that the federal tax also

attaches prior to the point of the retail sale. However, even if the liability for the excise taxes did arise simultaneously with the sales tax, we cannot see any legal distinction, constitutional or otherwise, arising from that circumstance. The Illinois Supreme Court also addressed this contention when made in *Martin Oil Service, Inc., supra*, as to the federal excise tax, and rejected it for the following reasons with which we agree.

> "The legal incidence of the Federal gasoline tax is on the producer, who is under no legal duty to pass the burden of the tax on the consumer. If he does pass on the burden of the tax it is simply done by charging the consumer a higher price. This higher price is the result of the added cost, because of the burden of the Federal tax, to the producer in selling his gasoline. It is no different from other costs he incurs in bringing his product to market, including the costs of raw material, its processing and its delivery. All these costs are includable in his 'gross receipts' or the 'consideration' he receives for his gasoline. No reason is given . . . why the cost of the gasoline tax should be regarded differently from the other costs of the producer-retailer and we perceive none." 273 N. E. 2d, at 828.

Second, petitioner argues that "since other independent oil dealers in those states which do not include the federal excise tax as a part of the sales tax base would not be forced to pay such tax [*e. g.*, Pennsylvania, see *Tax Review Board* v. *Esso Standard, supra*], then the arbitrary imposition of such tax upon [petitioner] and those other independent oil dealers in his class (who have to pay a sales tax on federal excise tax) would deprive [petitioner] of the Fourteenth Amendment's guarantee to equal protection of the laws." Petitioner's Brief, at 21. The contention is patently frivolous. The prohibition of the

Equal Protection Clause is against its denial by the State, here Mississippi, as between taxpayers subject to its laws. Petitioner makes no claim of unconstitutional discrimination by Mississippi of its sales tax act among taxpayers subject to that tax.

Affirmed.

MR. JUSTICE DOUGLAS took no part in the consideration or decision of this case.